Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

CHOWCHILLA WATER DISTRICT AND MADERA IRRIGATION DISTRICT

Petitioners

vs,

NATURAL RESOURCES DEFENSE COUNCIL, ET AL.

Respondents

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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39 pp

I.
THE QUESTIONS PRESENTED FOR REVIEW:

Congress authorized the Central Valley Project on the basis that the San Joaquin River between Gravelly Ford and Mendota Pool would be dry in the absence of flood control releases.

In 1939 Petitioner, Madera Irrigation District ("Madera") pursuant to a contract with the United States, conveyed its Friant Dam site and its rights to divert water from the San Joaquin River to the United States to be used in the construction of the Central Valley Project in return for a promise by the United States to deliver to Petitioner, a permanent specified quantity of water from the Project, pursuant to successive Water Service Contracts at a price no higher than that charged to other Friant contractors.

In 1949, with the consent of the United States, a portion of this Contract was assigned to the Petitioner Chowchilla Water District ("Chowchilla") who in 1950 executed a forty year contract, which for its term satisfied Chowchilla's rights under the 1939 Contract and which recognized Chowchilla's right of renewal under the 1939 Contract.

In 1993 Chowchilla, under its 1939 Contract rights, executed a forty year renewal contract for its allocated water supply. This contract was voided by the district and circuit courts on the basis that a Section 7 consultation under ESA had not been completed when the contract was executed.

Question for Review Number 1: Where Congress, by legislation, has directed the Secretary of Interior not to release water from Friant Dam, a part of the Central Valley Project, for the purpose of restoring fish life below the dam, without a further act of Congress, can Section 5937 of the

State of California's Fish and Game Code require the Secretary to make such releases?

Question for Review Number 2: Where Chowchilla has a vested right of renewal for a definitive Project water supply from the United States, protected by the 5th Amendment, is a Section 7 consultation necessary as a prerequisite to renewal?

Question for Review Number 3: Was the Section 7 review completed when Chowchilla's contract became effective?

II.
THE PARTIES TO THE PROCEEDING

A. PLAINTIFFS AND RESPONDENTS:

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTS FISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMAN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION and NATIONAL AUDOBON SOCIETY.

B. FEDERAL DEFENDANTS:

ROGER PATTERSON, AS REGIONAL DIRECTOR OF THE MID-PACIFIC REGION OF THE UNITED STATES BUREAU OF RECLAMATION; AND BRUCE BABBITT, AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR.

C. NON FEDERAL DEFENDANTS AND PETITIONERS:

FRIANT WATER USERS AUTHORITY; ORANGE COVE IRRIGATION DISTRICT; LINDMORE IRRIGATION DISTRICT; TERRA BELLA IRRIGATION DISTRICT; EXETER IRRIGATION DISTRICT; IVANHOE IRRIGATION DISTRICT; LOWER TULE RIVER IRRIGATION DISTRICT; SAUCELITO IRRIGATION DISTRICT; DELANO-EARLIMART IRRIGATION DISTRICT; TEAPOT DOME IRRIGATION DISTRICT; ARVIN EDISON WATER

STORAGE DISTRICT; SOUTHERN SAN JOAQUIN MUNICIPAL UTILITY DISTRICT; SHAFTER-WASCO IRRIGATION DISTRICT; PORTERVILLE IRRIGATION DISTRICT; STONE CORRAL IRRIGATION DISTRICT; TULARE IRRIGATION DISTRICT; LINDSAY-STRATHMORE IRRIGTION DISTRICT; CHOWCHILLA WATER DISTRICT and MADERA IRRIGATION DISTRICT

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V.
CITATIONS OF THE OFFICIAL AND UNOFFICAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

The decision of the United States Court of Appeals for the Ninth Circuit is reported in 146 F.3d 1118. One of the several applicable orders of the United States District Court is reported at 791 F. Supp.1425.

VI.
BASIS FOR JURISDICTION

A. The decision of the United States Court of Appeals for the Ninth Circuit was filed on June 24, 1998.
B. The Petition for Rehearing was filed on August 5, 1998.
C. The Petition for Rehearing was denied on September 8, 1998.
D. The statutory provisions believed to confer on this Court jurisdiction to review on writ of certiorari the judgment or order in question is 28 U.S.C. §1254(a) and 43 U.S.C. §390uu.

VII.
THE CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THE CASE

1. Fifth Amendment of the Constitution of the United States.

2. Section 7 of the Endangered Species Act (ESA) 16 U.S.C. § 1530.

3. CVPIA § 3406(c) Public L. No. 102-575, 1992 U.S.C. (106 Stat.) at 4721.

4. Section 8 of the Reclamation Act of 1902 (43 U.S.C. § 383)

5. California Fish Game Code §5937.

VIII.
STATEMENT OF THE CASE

A. WHY CERTIORARI SHOULD BE GRANTED.

This case raises issues of national importance. The first of these is whether, in the operation of the largest reclamation project in the United States, a state law can countermand a direct Congressional edict on how the Project is to be operated in a manner that may result in the loss of over one million acres of highly developed farm land.

The second is the scope of the consultation requirements of Section 7 of the Endangered Species Act. (ESA)

Further, the decision of the of the United States Court of Appeals for the Ninth Circuit is in conflict with the decisions of two other Circuits.

B. THE FACTS MATERIAL TO THE QUESTIONS PRESENTED.

1. THE FRIANT DIVISION OF THE CENTRAL VALLEY PROJECT.

Friant Dam is located on the San Joaquin River. Under both the State and Federal Central Valley Project (CVP), Friant Dam was intended to divert almost all of the flows of the San Joaquin River into Madera Canal to the North, and the Friant Kern Canal to the South. The only releases, other than flood control releases, that were made down the channel were for irrigated riparian croplands between Friant Dam and Gravelly Ford, approximately twenty two miles downstream from the Dam.

The two canals feed water to approximately one million acres of highly developed farm lands on the East side of the San Joaquin Valley.

Except for intermittent flood control releases, the river bed between Gravelly Ford and Mendota Pool, approximately fourteen miles downstream, was to be dry. It has been dry, under operation of the Project, for over sixty years. Under the Project, Delta Mendota Canal was constructed to bring water from the San Joaquin-Sacramento Delta to Mendota Pool to replace the water formerly diverted from the San Joaquin River to crop-lands by the Exchange Contractors. The water rights on the San Joaquin River held by the owners of the "Grasslands" [diversions to native pasture downstream from Gravelly Ford] were acquired by the United States, which together with the quantities obtained from the Exchange Contractors, provided the water to be diverted at Friant to serve crop lands on the East side of the San Joaquin Valley, which were going dry from lack of groundwater.

Friant Dam has limited storage capacity. The water delivered under the contracts with the districts is classified as Class 1, which is supposed to be a firm supply consisting of the first 800,000 acre feet of flow and Class 2, the remaining flows. Class 2 flows will be zero in drought years and as high as 1,402,800 acre feet in wet years. In 1977, a drought year, the Class 1 supply was only 25% of the 800,000 acre feet.

The lands served by Friant are mostly planted to permanent crops such as trees and vines. All of the lands overly a severely overdrafted groundwater supplies and some have no groundwater supplies at all. Without continuation of delivery of the quantities of water contracted for and delivered for over forty-five years, the lands will become unproductive and barren.

To release flows from Friant to re-establish a Salmon run in the San Joaquin River would take a large portion of the Class 1 supply, as flows would be required every year.

2. THE 1939 CONTRACT.

Madera and Chowchilla are unique from other Friant Unit Contractors in that they are the recipients of the benefits afforded to them under the 1939 Contract between Madera and the United States, a portion of which was assigned to Chowchilla when land in Madera was withdrawn to form Chowchilla.

The 1939 Contract is described in *Madera Irrigation District v. Hancock*, 985 F.2d 1397, 1399 (9th Cir. 1993) as follows:

> "In 1939, Madera Irrigation District sold land and San Joaquin River water rights to the United States. As part of the consideration, the United States promised to build the Friant Dam and the Madera Canal and enter into contracts, when the project was completed, to sell Madera a permanent supply of 270,000 acre feet of water annually. The parties agreed that 'it is not possible at this time to fix a price to be paid by the District for said water, but the United States agrees that the cost of said water to the District shall not exceed charges made to others than the District for the same class of water and service from the said Friant Dam and Reservoir.'
>
> "In 1951 when construction was done, Madera and the government entered into a forty year contract for purchase and sale of water. They agreed upon a 'permanent' supply, but a contract term of forty years. Under the 1951 contract and 'under succeeding contracts the rates to be charged

the District for water service shall not exceed charges made to others than the District for the same class of water and service from Friant Dam and Reservoir.' The 1951 Contract provided that the executory portions of the 1939 contract ... shall remain in full force and effect." [Chowchilla had entered into a similar forty year contract in 1951 covering its share of the 1939 Contract.] [Added]

3. CONTRACT RENEWALS

Prior to the end of the initial forty-year contracts, Chowchilla and Madera were negotiating the renewals thereof. The United States demanded contract terms, which would require additional payment for the water delivered under the first forty-year contracts and gave the Secretary the unilateral right to amend the contracts after an environmental study had been completed. Chowchilla and Madera claiming that these provisions violated their rights, filed an action in declaratory relief which was dismissed by the District Court and affirmed on appeal in *Madera Irrigation District v. Hancock, supra.* While the appeal was pending, Chowchilla's contract was about to expire and in order to continue to get delivery of Project water, the United States required Chowchilla to dismiss its appeal and execute a long term forty year renewal contract with the objectionable provisions in it. Chowchilla complied. Madera continued the appeal and the enactment of the CVPIA prevented Madera from executing a long term renewal contract. Madera is now operating under an interim renewal contract.

Both Chowchilla's long term renewal contract, and Madera's interim renewal contract, recognize their rights of future renewal for their specified quantities of water pursuant to the 1939 Contract at a price no higher than that charged to other Friant Contractors.

Chowchilla executed its forty-year renewal contract on August 30, 1991 prior to the satisfaction of all ESA requirements which may exist, but its contract was not validated until December 15, 1991, after all ESA requirements had been met.

C. THE BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE.

1. 43 U.S.C. § 390uu provides authority to commence an action against the United States involving Reclamation Contracts in the District Court.

IX.
ARGUMENT

A. JOINDER AND ADOPTION BY REFERENCE

Chowchilla and Madera adopt by reference the Appendix to the Petition filed concurrently herewith by Friant Water Users Authority et al. and join therein.

The Argument set forth herein will be limited to Congressional intention in regard to releases of water from Friant Dam for the restoration of the flows in the river below Gravelly Ford to restore a Salmon run and the effect of the Endangered Species Act (ESA) on Chowchilla's renewal contract.

B. UNDER SECTION 8 OF THE 1902 RECLAMATION ACT, STATE LAW APPLIES TO THE APPROPRIATION AND DELIVERY OF WATER UNLESS THAT LAW IS CONTRARY TO CONGRESSIONAL INTENT.

1. THE RELATIONSHIP OF FEDERAL AND STATE LAWS.

In its landmark decision in *California v. United States*, 438 U.S. 645 (1978) this Court confirmed that reclamation of the arid lands of the western states was undertaken in a spirit of "cooperative federalism" that incorporated a "consistent thread of purposeful and continued deference to state water law by Congress." (438 U.S. at 653.) Thus, when Congress adopted the Reclamation Act of 1902, it included Section 8 (43 U.S.C. § 383) which provides that nothing in the Act shall be construed "to interfere with the laws of any state . . . relating to the control, appropriation, use or distribution of water used in irrigation . . . and the Secretary of Interior, in carrying out the

provisions of the Act, shall proceed in conformity with such laws. . . ."

As interpreted by the Supreme Court, the terms of Section 8 are inclusive. However, they are not without limits. In *California v. United States*, this Court held that Section 8 subjected the distribution of reclamation water to state law unless that law is inconsistent with congressional directives. *California v. United States, supra,* 438 U.S. at 674-75; On remand, the 9th Circuit elaborated:

> "We do not think that Section 8 of the 1902 Reclamation Act was intended to require any later Congress to tolerate state laws whose operation would otherwise be curtailed by the Supremacy Clause, nor to require any particular form of clear statement by a later Congress before inconsistent state laws were overridden. Section 8 requires only that state law will apply unless the contrary is intended by Congress; as we stated in *United States v. Tulare Lake Canal Co.*, 677 F.2d 713, 717 (9th Cir. 1982), the Supreme Court decision in *California v. United States* requires 'that the United States follow state water law absent a pre-empting federal statute.'" *U.S. v. State of Cal. State Water Resources,* 694 F.2d 1171, 1176 (9th Cir. 1982). (Emphasis added)

Accordingly, in determining whether a state statute is "inconsistent" with "congressional directives" for purposes of Section 8, the 9th Circuit turned to the cases deciding whether state regulation is preempted under the Supremacy Clause by congressional action. (694 F.2d at 1176.) These cases hold that "[a] statute or regulation is preempted by a federal rule 'to the extent it conflicts with a federal statute,' or where it 'stands as an obstacle to the full accomplishment and execution of the full proposes and

objectives of Congress.'" *U.S. v. State of Cal, State Water Resources, supra,* 694 F.2d at 1177. Thus, in the reclamation context, the 9th Circuit determined:

> "[A] state limitation or condition on the federal management or control of a federally financed water project is valid unless it clashes with express or clearly implied congressional intent or works at cross-purposes with an important federal interest served by the congressional scheme." Id. (Emphasis added)

C. THE ADOPTION OF CVPIA § 3406(c) WAS A MANIFESTATION OF PRIOR CONGRESSIONAL INTENT THAT THE RIVER BETWEEN GRAVELLY FORD AND MENDOTA POOL REMAIN DRY.

1. THE ISSUE.

We now turn to see whether there has been an express or clearly implied congressional intent which abrogates the application of California Fish & Game Code §5937 or whether §5937 works at cross-purposes with an important federal interest served by the congressional scheme.

§ 5937 in relevant part provides:

> **"The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam."**

Section 3406(c) of the Central Valley Project Improvement Act (CVPIA) prohibits the Secretary from

making releases for fish restoration from Friant Dam without a further act of Congress.

The 9th Circuit affirmed the District Court's holding that the CVPIA did not contain a facial preemption of the application of § 5937 to releases by the Secretary from Friant Dam.

2. CONGRESSIONAL INTENT PRIOR TO THE ADOPTION OF CVPIA

Prior to the adoption of a new project by Congress, the Secretary of Interior is required to make a report to the President who sends it to Congress regarding the feasibility of the Project. Secretary Ickes on November 26, 1935 sent his finding of feasibility to President Roosevelt who approved it and sent it to Congress on December 2, 1935. This report upon which Congress authorized the Project stated in regard to Friant Dam:

> "The supply for the San Joaquin Valley will be conveyed up the San Joaquin River through a series of pumping plants and intervening natural and artificial channels a distance of 150 miles lifting the water to an elevation of 160 feet above sea level. (Mendota Pool) This water will replace San Joaquin River water now used for irrigation in the northern San Joaquin Valley, thus permitting the entire flow of the San Joaquin River to be regulated at Friant Reservoir--the second storage unit of the project to be utilized in the southern San Joaquin Valley where local supplies are deficient. Water from this reservoir will be delivered by gravity through conduits extending northerly and southerly to serve developed irrigated lands in an area extending

from Madera County on the north to Kern County on the south." (Emphasis added)

Thus at the very outset of the Project, Congress was informed that the "entire flow of the San Joaquin River would be regulated at Friant Reservoir" to supply the northerly and southerly canals.

Congressional intent regarding a Project, unless specifically set forth by Congress, is determined by this Court. On three separate occasions this Court has clearly determined that Congressional intent was that the San Joaquin River between Gravelly Ford and Mendota Pool would be dry.

The first of these is *United States v. Gerlach Live Stock Company* 339 U.S. 725, 94 L Ed 1231 (1950) It was made clear how the Project was to be operated. The Court stated at 229 US 729:

> **"A more dramatic feature of the plan is the water storage and irrigation system at the other end of the valley. There the waters of the San Joaquin will be arrested at Friant, where they would take leave of the mountains, and will be diverted north and south through a system of canals and sold to irrigate more than a million acres of land, some as far as 160 miles away. A cost of refreshing this great expanse of semiarid land is that, except for occasional spills, only a dry river bed will cross the plain below the dam." (Emphasis added)**

At page 730:

> **"Except at rare intervals there will be no spill over Friant Dam, the bed of the San Joaquin River along**

claimants' lands will be parched and their grass lands will be barren"

The Court did not make its pronouncements in a vacuum, it was based on Congressional intent. In speaking about Congressional intent, the Court stated at 740:

> **"...we have observed that the plan as originally adopted and as carried out by the Bureau included replacement at great expense of all water formerly used for crops and 'controlled grass lands' and purchase of that used on marginal pasture lands. It has consistently advised the Congress that it was purchasing San Joaquin water rights and appropriations have been made accordingly."**

At page 735:

> **"The original plan called for the purchase of water rights and included an estimate of their cost. ... Such has specifically been the Bureau's practice in connection with the Friant Project, and this has been reported to Congress, which has responded nine times in the past twelve years to requests for appropriations to meet such expenses. We think that this amounts, not to authorizations and declarations creating causes of action against the United States, but an awareness and approval of administrative construction."**

At page 732:

> **"A finding of feasibility, as required by law [as a prerequisite to Congressional authorization] was made by the Secretary of Interior on November 26, 1935 . . . was approved by the President on December 2, 1935."**

The Court in *Gerlach* speaks of the information on the Friant project given to Congress in appropriations for the CVP. In footnote [9] on page 735, the Court lists 15 Congressional Hearings in which the Project was described and at page 735 states:

> **"Such has specifically been the Bureau's practice in connection with the Friant project, and this has been reported to Congress,[9] which has responded some nine times in the past twelve years to requests for appropriation to meet such expenditures. We think this amounts, not to authorizations and declarations creating causes of action against the United States, but to awareness and approval of administrative construction."**

The second case involving Congressional intent in the operation of Friant Dam is *Ivanhoe Irrigation District v. McCracken,* 357 US 275, 78 S Ct 1174, 2 L Ed 2d 1313 (1950). Again this was a case involving Congressional intent in relation to the CVP and the application of Congressional directives as against state law. The Court stated in relation to Friant Dam at page 357 US 282:

> **"The water is pumped from the Delta to the canal along the foothills of the Coast Range and by gravity it runs to the pool at Mendota. This exchange of water replaces that diverted from the San Joaquin by the dam at Friant. This latter dam forces the entire flow of the San Joaquin into Millerton Lake which has a capacity of 520,000 acre feet of water. It is diverted from the lake by the Madera Canal to the north and the Friant-Kern Canal to the south. (Emphasis added)**

Next in line is *Dugan v. Rank,* 372 US 609, 83 S Ct 999, 10 L Ed 2d 15, (1963) which involved the San Joaquin River between Friant Dam and Gravelly Ford where, under project operation, a live stream was to be maintained because the riparian use in that area was for irrigated crops, not uncontrolled grasslands, but the River would be dry below Gravelly Ford to Mendota Pool. The trial court in *Dugan* had issued an injunction against the United States and the federal officials operating the project to either install a series of 10 dams in the river between Friant Dam and Gravelly Ford or release the entire natural flow of the river through Friant Dam. *Rank v. Krug* 142 F Supp 1. [It is noted that District Court Judgment provided that the last dam was to be placed immediately below Gravelly Ford and only 5 second feet of flow was required to be released which would result in a dry river bed between just below the dam and Mendota Pool.] The Court of Appeals dismissed the judgment against the United States, but allowed it to stand against the federal officials. *California v. Rank,* 293 F2d 340 and 307 F2d 96. The Supreme Court reversed the entire judgment.

At 372 US 620-21:

> "As the Court of Appeals found, the Project 'could not operate without impairing, to some degree, the full natural flow of the river.' Experience of over a decade along the stretch of the San Joaquin involved here indicates clearly that the impairment was most substantial--almost three-fourths of the natural flow of the river. To require the full natural flow of the river to go through the dam would force the abandonment of this portion of a project which has not only been fully authorized by Congress but paid for through its continuing appropriations. Moreover, it would prevent the fulfillment of the contracts made by the United States with the Water and Utility Districts which are petitioning in No. 115. The Gov-

> ernment would, indeed, be 'stopped in its tracks' . . . (Emphasis added)
>
> "Moreover, the decree would require the United States--contrary to the mandate of Congress--to dispose of valuable irrigation water and deprive it of the full use and control of its reclamation facilities." (Emphasis added)

In footnote [7] at 372 US 271 the Court refers to the Secretary's announced plan of operation of maintaining a live stream only between Friant and Gravelly Ford and adds:

> "Parenthetically, we note that petitioners, in their brief at p. 12, inform us that 'Friant Dam has since been operated in accordance with the Secretary's stated plan, subject to adjustments required by weather and other conditions.'"

These cases establish that Congressional intent prior to the passage of CVPIA was that Friant Dam be operated in such manner as to divert all of the flows of the San Joaquin into Madera and Friant Kern Canals, except those releases to meet the water rights of landowners on the river between the Dam and Gravelly Ford. Between Gravelly Ford and Mendota Pool, except for occasional flood releases, the River would be dry. The Project has been operated in this manner for over 50 years. This Congressional intent does not tolerate the imposition of §5937 to re-establish a Salmon run in a River that Congress determined should be dry.

3. THE CVPIA CARRIED FORWARD THE PRIOR CONGRESSIONAL INTENT IN THE FORM OF A CONGRESSIONAL DIRECTIVE.

As previously described, when Congress authorized the Friant Unit, it set forth its intent that the Project regulate the entire flow of the San Joaquin River so that the River between Gravelly Ford and Mendota Pool would be dry. Nearly 60 years later, when it adopted the CVPIA, Congress transformed this intent into a Congressional directive.

For the most part, when it crafted the CVPIA, Congress wrote broadly. Thus, for example, in describing the purposes of the Act, Congress stated them to be:

> **"(a) to protect, restore, and enhance fish, wildlife, and associated habitats in the Central Valley . . . basin of California;**
>
> **"(b) to address impacts of the Central Valley Project on fish, wildlife and associated habitats;**
>
> **...**
>
> **"(f) to achieve a reasonable balance among competing demands for use of Central Valley Project water, including the requirements of fish and wildlife. . . ." CVPIA § 3402 (106 Stat. 4706).**

Similarly, when Congress identified the fish and wildlife restoration activities it desired the Government to undertake to achieve the purposes of the Act, it wrote inclusively. Thus, Congress set forth some 23 separate activities ranging from the dedication of CVP yield for fish restoration purposes to the installation of a temperature control device at Shasta Dam. CVPIA § 3406(b); 106 Stat. 4714-21.

When it came to the protection and enhancement of fishery resources on the San Joaquin River, however, Congress took a different approach. Thus, although it directed the Secretary of Interior to develop a program to double the natural production of anadromous fish in Central Valley rivers by providing "flows of suitable quality, quantity and

timing to protect all life stages of anadromous fish" (§ 3406(b)(1), it specifically excluded the San Joaquin River from the program:

> **"The Secretary . . . is further authorized and directed to:**
> **(1) develop within three years of enactment and implement a program which makes all reasonable efforts to ensure that, by the year 2002, natural production of anadromous fish in Central Valley rivers and streams will be sustainable, on a long-term basis, at levels not less than twice the average levels attained during the period 1967-1991; Provided, that this goal shall not apply to the San Joaquin River between Friant Dam and the Mendota Pool, for which a separate program is authorized under subsection 3406(c) of this title . . ." CVPIA § 3406(b)(1); 106 Stat. 4714, emphasis added.**

Rather than include the San Joaquin in a fish doubling program to be achieved through the provision of in-stream flows, Congress instead, directed the Secretary to develop a "comprehensive plan" to address fish and wildlife concerns on the River. It also required that the plan adhere to a "reasonable, prudent and feasible" standard found nowhere else in the Act:

> **"The Secretary shall, by not later than September 30, 1996:**
> **(1) develop a comprehensive plan, which is reasonable, prudent and feasible, to address fish, wildlife and habitat concerns on the San Joaquin River, including but not limited to the stream flow, channel, riparian habitat and water quality improvements that would be needed to reestablish where necessary and to sustain naturally reproducing anadromous fisheries from Friant Dam to its confluence with the**

San Francisco Bay/Sacramento-San Joaquin Delta Estuary." CVPIA § 3406(c); 106 Stat. 4721.

Congress was also explicit about the release of flow from Friant Dam prior to the implementation of such a "comprehensive plan." Until such implementation is authorized by Congress, the Secretary is barred from making releases for the restoration of flows to the lower San Joaquin River absent a further act of Congress:

> "During the term that the Secretary is developing the plan provided for in this subsection, and until such time as Congress has authorized the Secretary to implement such plan, with or without modifications, the Secretary shall not, as a measure to implement this title, make releases for the restoration of flows between Gravelly Ford and the Mendota Pool and shall not thereafter make such releases as a measure to implement this title without a specific Act of Congress authorizing such releases." Id.

Rather than requiring the release of Friant Unit water for fishery purposes, Congress instead, provided for the payment of in-lieu monetary surcharges by the Friant Intervenors. Id.

It is difficult to find a clearer statement of "an important federal interest served by the congressional scheme" than that set forth in § 3406(c).

NRDC's attempted application of § 5937 to compel the release of water from Friant Dam is inconsistent with the approach laid out in the CVPIA. Unlike Congress' proposed comprehensive plan, to be approved by Congress, § 5937 is not governed by standards of reasonableness, prudence or feasibility. Instead, the guiding standard is simply the release of "sufficient water" to maintain fish below a

dam in good condition. Moreover, while the CVPIA requires the decision about further releases from Friant to be made by Congress, the recommendation of what water is "sufficient" under § 5937 is made, not by Congress, but by California's Department of Fish and Game, the State Water Resources Board, or the Courts applying state law. Finally, while Congress established a program of in-lieu surcharges to be paid by the Friant Intervenors, nothing in § 5937 provides for the payment of a surcharge in lieu of "sufficient water."

The Circuit Court in interpreting the CVPIA and determined that:

> **"The CVPIA provides that Friant dam water is not to be released from the Friant Dam to comply with provisions of the CVPIA regarding the development of a plan to reestablish fish below the dam.**
>
> **"There is no clear directive in the CVPIA that preempts application of §5937 if the state law could be implemented in a way that is consistent with Congress' plan to develop and restore fisheries below Friant dam in a manner that is 'reasonable, prudent and feasible.'" (Emphasis added)**

The Court failed to consider that the prohibition of release of water to reestablish a salmon run as set forth in the CVPIA was a continuation of a long standing Congressional intent that the river below Gravelley Ford to Mendota Pool would be dry.

As Congress has not as yet adopted a plan of restoration that is "reasonable, prudent and feasible" and, by Congressional Act, directing releases by the Secretary, how can §5937 be implemented in a way that is consistent with a plan approved by Congress, when no such plan exists? Congress has reserved to itself the right to adopt a plan if it is reason-

able, prudent and feasible. It has not delegated that power to any agency of the State.

The Secretary cannot dance to two drummers. The 9th Circuit failed to consider that releases from Friant Dam for fish restoration can only be governed by either State direction to the Secretary under § 5937 or Congressional direction pursuant to the CVPIA, and any restoration plan that might be developed thereunder. Releases cannot be governed by both. If Congress says, "leave the river dry until we act otherwise" and the State says, "re-establish the flows" whose edict does the Secretary follow? The answer lies in the express mandates of congressional intent and the Supremacy Clause of the Constitution.

The Circuit Court attempted to avoid such an obvious conflict by noting that Congress had prohibited the Secretary from releasing water from Friant for the restoration of flows only "as a measure to implement this title." It then stated:

> "The plain meaning of the statute is that the restoration only applies to those releases required under the CVP Improvement Act. By implication, therefore, other releases, such as those mandated by section 5937, are permitted."

When Congress linked the prohibition of Friant releases to the implementation of "this title," it did not write narrowly as suggested by the Circuit Court. To the contrary, the purposes of "this title" were described by Congress in the broadest possible terms with respect to fish and wildlife. CVPIA § 3402, 106 Stat. 4706. Thus, when Congress barred releases from Friant absent a further Act of Congress, it did so with respect to "this title's" broad purpose of protecting, restoring and enhancing fish and wild-

life habitats in the Central Valley (§ 3402(a)) and its equally broad purpose of addressing impacts of the CVP on fish (§ 3402(b)).

In summary, there is facial preemption in the CVPIA of the application of §5937 to releases from Friant Dam. The long standing Congressional intent that the River remain dry between Gravelly Ford and Mendota Pool is now manifested as a Congressional Directive in the CVPIA.

D. THE 1939 CONTRACT CREATED VESTED RIGHTS OF RENEWAL FOR A SPECIFIED QUANTITY OF WATER WHICH PRECLUDED SECTION 7 CONSULTATION.

1. MADERA AND CHOWCHILLA'S VESTED RIGHTS

While the decision in *Madera Irrigation District v. Hancock, supra,* sustained the trial court's judgment of dismissal, it also established that Madera and Chowchilla had vested constitutionally protected rights to a permanent supply of water from the Project by the continuing right of renewal. At 985 F.2d. 1401-1402 the Court stated:

> **"We accept Madera's general proposition that a valid contract right of an irrigation district against the United States is property protected by the Fifth Amendment. *Lynch v. United States*, 292 U.S. 571, 579, 54 S.Ct. 840, 843, 78 L.Ed. 1434 (1934); See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003, 104 S.Ct. 2862, 2873, 81 L.Ed.2d 815 (1984). Rights against the United States arising out of a contract are property rights protected from deprivation or impairment by the Fifth Amendment. *Barcellos and Wolfsen, Inc. v. Westlands Water District*, 899 F.2d 814, 821 (9th Cir. 1990). The Due Process Clause**

limits the exercise of sovereign power which would impair obligations under government contracts." *Alpine Ridge Group v. Kemp*, 955 F.2d 1382, 1387 (9th Cir.), *cert. granted*, ___U.S ___ 113 S.Ct. 490, 121 L.Ed.2d 429 (1992). To demonstrate a wrongful taking or impairment, Madera must establish that it has cognizable property rights arising out of its contracts with the government and that the government has abrogated its contractual rights.

"A. Right to Renewal.

The government offers a broad justification for the operation and maintenance charges and all the other changes at issue which we cannot accept. It urges that Madera had no renewal right under the contract, so the government was free to offer renewal on any terms. We cannot reconcile that with the terms of the 1939 Contract and 1951 contracts. Madera did not exchange its land and its water rights for a forty year supply of water. It exchanged them, as its 1951 contract recites, for a 'permanent' supply of water. Section 4 of the 1951 contract expressly provided for renewal at the expiration of the forty year term and terms for the 'succeeding contracts': . . . (Emphasis added)

"This provision guarantees Madera certain rights after the expiration of the 1951 contract. It has a vested property right to a permanent water supply based on express provisions of its contracts. *Cf. Alpine Ridge Group v. Kemp*, 955 F.2d 1382, 1385-86 (9th Cir.1992). (Express provisions of contract supported by independent consideration, not merely legislative provisions, create vested property rights), *cert. granted*, ___U.S. ___113 S.Ct. 490, 121 L.Ed. 2d 429 (1992)."

The Court then went on to hold that neither the contract amendment provision nor the increased price for water violated Madera and Chowchilla's rights under their contracts. In so doing, however, it used the "surrendered in unmistakable terms" test that was abrogated by this Court in *United States v. Winstar Corp.* 116 S Ct 2432 (1996) 135 L Ed 2d 964. As stated at page 997:

> **"Injecting the opportunity for unmistakability litigation into every common contract action would, however produce the untoward result of compromising the Government's practical capacity to make contracts, which we have held to be 'of essence of sovereignty' itself."**

And at page 998:

> **"In any event, we think the dissent goes fundamentally wrong when it concludes that 'the issue of remedy for . . . breach' can arise only 'if the sovereign did surrender its power unequivocally.' . . . This view ignores the other, less remarkable possibility actually found by both courts that construed these contracts that the Government agreed to do something that did not implicate its sovereign powers at all, that is to indemnify its contracting partners against financial losses arising from regulatory change."**

When the United States agreed to furnish Madera, and, by assignment Chowchilla, a specified quantity of water in perpetuity in exchange for the dam site at Friant and Madera's adjudicated rights to the flows of the San Joaquin River, the "Government agreed to do something that did not implicate its sovereign powers." It provided a vested right in Madera and later by assignment to Chowchilla, to continue to receive that supply, protected by the Fifth Amendment.

The rights to a specified quantity of water from Friant in perpetuity were granted by the United States to Madera and Chowchilla by the 1939 Contract in return for the conveyance to the United States of the land constituting the dam site at Friant and an assignment of the adjudicated rights to the flows of the San Joaquin River. While the initial forty year contracts satisfied that right during their term, on the expiration of those contracts Madera and Chowchilla were reinvested with their rights under the 1939 Contract. [See *Madera Irrigation District v. Hancock, supra,* at 985 F.2d 1401.]

2. WHERE A VESTED RIGHT BY CONTRACT WITH THE UNITED STATES HAS ACCRUED PRIOR TO THE ADOPTION OF ESA, SECTION 7 CONSULTATION IS NOT A PREREQUISITE TO FULFILLING THAT RIGHT.

In *Sierra Club v. Babbitt,* 65 F.3d 1502 (9th Cir 1995), prior to the passage of ESA, BLM had granted a road right of way to Seneca for the construction of a road across government land. Seneca started construction after the adoption of ESA and Sierra Club brought an action to enjoin construction claiming a violation of ESA. In discussing whether ESA should be applied retroactively to prohibit the exercise of rights granted prior to its passage, the Court stated at page 1507:

> **"The only issue remaining, therefore, is whether the BLM's failure to consult with the FWS on Seneca's right-of-way construction was a violation of the consultation provisions of section 7."**

At pages 1508-09:

> **"To what extent does Section 7 apply where the BLM granted right-of-way by contract to a private entity before passage of ESA and the agency's continuing ability to influence the private conduct is limited to three factors unrelated to the conservation of the threatened spotted owl.**
>
> **"The regulations supply the answer: 'Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.'"**

At page 1509:

> **". . . the right-of-way was granted prior to the enactment of ESA and there is no further action relevant to the threatened spotted owl that the BLM can take prior to Seneca's exercise of their contractual rights."**

Even without regard to the rights of Madera and Chowchilla under the 1939 Contract, the District Court in its May 30, 1995 Order on summary judgment found as undisputed facts:

> **"Here, it is undisputed that the renewal contracts maintain the status quo as to water service. Deliveries under the new contracts will be for the same quantities and accomplished by the same scope of Friant Unit operations as deliveries under the previous long-term contracts. Accordingly, renewal will maintain the status quo as to the diversion from the San Joaquin River, the scope of agricultural irrigation and the terms of the contractual relationship between the federal and non federal defendants. In this sense, the disputed action accomplishes 'nothing new, nor more extensive, nor other than contemplated'**

when the original water service contracts were executed."

Thus, the activity of the United States, pursuant to the requirements of the 1939 Contract, in executing the original forty year contracts and Chowchilla's forty year renewal contract [all of which stated that they performed the 1939 Contract obligations of the United States during their terms] does not depend on "additional agency action", but "continued agency action" which has been in place since deliveries began under the original forty-year contracts.

The Circuit Court, in its opinion, lumped Madera and Chowchilla's rights with those of Orange Cove and quoted the provisions of the statutory right of renewal contained in 43 U.S.C. § 485h (1) etc. which give discretion to the United States in renewal. It did not consider the vested rights of Madera and Chowchilla under the 1939 contract.

While Madera and Chowchilla, or their landowners, might be subject to a violation of ESA by a taking of endangered species, they were not required to undergo a Section 7 consultation as their contract rights preceded ESA and there was no change in operations under the contracts.

The District Court, in its May 31, 1995 Order, [mooted by the 9th Circuit] guided by the 9th Circuit's decisions in *Upper Snake River Chapter of Trout Unlimited v. Hodel,* 921 F2d 232 (9th Cir. 1990) and *Nat'l Wildlife Fed'n v. Espy,* 45 F3d 1337 (9th Cir. 1995), properly concluded that renewal of Chowchilla's contract did not constitute "agency action" under NEPA. As stated in *Upper Snake River, supra* at page 235:

> **"This circuit has held that where a proposed federal action would not change the status quo, an EIS is not necessary. 'An EIS need not discuss the**

environmental effects of mere continued operation of a facility' (*Burbank, supra*)."

In spite of this determination, the District Court and the 9th Circuit found that the very same maintenance of the status quo constituted "agency action" under ESA and required prior consultation prior to contracting.

This determination is totally contrary to the 9th Circuit's opinion in *Marbled Murrelet v. Babbitt,* 83 F.3d 1068, 1075 (9th Cir 1996):

> **"The standards for 'major federal action' under NEPA and 'agency action' under ESA are much the same. If there is any difference, case law indicates 'major federal action' is the more exclusive standard."**

Under its guaranteed renewal rights under the 1939 Contract, the Chowchilla renewal contract clearly maintains the status quo, and, therefore, there is no "major agency action" under NEPA or "agency action" under ESA. Consultation under Section 7 is not required.

E. CHOWCHILLA'S RENEWAL CONTRACT BECAME EFFECTIVE AFTER COMPLETION OF ALL ESA REQUIRMENTS.

1. THE PRIOR PLEADINGS AND ORDERS.

In all of their pleadings, Plaintiffs had alleged that the contracts had been executed prior to the completion of Section 7 consultation under ESA.

In each of its previous orders, the District Court stated ten times that the controlling date on

the applicability of ESA was the date of execution of the contracts.

2. THE ORANGE COVE CONTRACT AND THE FINAL COURT ORDER.

Orange Cove had executed its contract prior to the listing of the Chinook Salmon and claimed, therefore, that ESA was inapplicable to its contract.

In its Final Order, filed January 16, 1997, the District Court for the first time stated that the effective date of the contracts was after entry of a judgment of validation. This was based on a provision in all of the contracts that the contract would not be binding on the United States until entry of a validation judgment. In this Order the Court stated that no petitions for modification or re-hearing would be allowed.

Chowchilla was not a party to Orange Cove's Motion to Reconsider which was the basis for the Court's Final Order. NRDC for the first time raised the validation issue in its response to Orange Cove's Motion to Reconsider.

In view of the pleadings and the Court's prior determinations that the effective date was the date of execution, Chowchilla had no opportunity to show that its validation judgment was subsequent to the completion of ESA documentation because that was not in issue.

3. CHOWCHILLA'S REQUEST FOR JUDICIAL NOTICE.

Chowchilla filed a request with the 9th Circuit for judicial notice of its validation judgment. The 9th

Circuit denied this request and failed to consider the issue because it had not been raised in the District Court, thus totally ignoring the fact that there was no opportunity to raise the issue before the District Court.

If the date of the validation judgment is the effective date of the contracts, as found by both the District Court and the 9th Circuit, then Chowchilla's contract became effective after all ESA requirements had been fulfilled and is valid.

CONCLUSION

This case involves the continued productivity of approximately one million acres of the most fertile farm lands in the nation. It presents extremely important issues regarding the federal – state relationship in the operation of the largest Reclamation Project in the Nation. For these reasons and those set forth in the other Petitions in this case, it is respectfully submitted that Certiorari should be granted.

Dated: November 27, 1998

GREEN, GREEN & RIGBY

By: Denslow Green

Denslow Green
Attorneys for Petitioners
Chowchilla Water District and
Madera Irrigation District

APPENDIX A.

DECISION OF 9TH CIRCUIT COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION; NATIONAL AUDUBON SOCIETY,

Plaintiffs-Appellees,

v.

DAVID G. HOUSTON,

Defendant,

and

LOWER TULE RIVER IRRIGATION DISTRICT; PORTERVILLE IRRIGATION DISTRICT; SAUCELITO IRRIGATION DISTRICT; STONE CORRAL IRRIGATION DISTRICT; TEAPOT DOME WATER DISTRICT,

Defendants-Intervenors-Appellants.

No. 97-16030

D.C. No. CV 88-1658 LKK

OPINION

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION; NATIONAL AUDUBON SOCIETY,

Plaintiffs-Appellees,

v.

DAVID G. HOUSTON,

Defendant,

and

ORANGE COVE IRRIGATION DISTRICT; DELANO-EARLIMART IRRIGATION DISTRICT; EXETER IRRIGATION DISTRICT; IVANHOE IRRIGATION DISTRICT; LINDMORE IRRIGATION DISTRICT; LINDSAY-STRATHMORE IRRIGATION DISTRICT; TERRA BELLA IRRIGATION DISTRICT,

Defendants-Intervenors-Appellants.

No. 97-16041

D.C. No.
CV 88-1658 LKK

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION; NATIONAL AUDUBON SOCIETY,

Plaintiffs-Appellees,

v.

DAVID G. HOUSTON,

Defendant,

and

FRIANT WATER USERS AUTHORITY,

Defendant-Appellant.

No. 97-16042

D.C. No.
CV 88-1658 LKK

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION; NATIONAL AUDUBON SOCIETY,

Plaintiffs-Appellees,

v.

DAVID G. HOUSTON,

Defendant,

and

MADERA IRRIGATION DISTRICT; CHOWCHILLA WATER DISTRICT,

Defendants-Intervenors-Appellants.

No. 97-16043

D.C. No. CV 88-1658 LKK

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION; NATIONAL AUDUBON SOCIETY,

Plaintiffs-Appellees,

v.

DAVID G. HOUSTON,

Defendant,

and

ARVIN-EDISON WATER STORAGE DISTRICT; SHAFTER-WASCO IRRIGATION DISTRICT; SOUTHERN SAN JOAQUIN MUNICIPAL UTILITY DISTRICT,

Defendants-Intervenors-Appellants.

No. 97-16044

D.C. No.
CV 88-1658 LKK

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION; NATIONAL AUDUBON SOCIETY,

Plaintiffs-Appellees,

v.

DAVID G. HOUSTON,

Defendant,

and

TULARE IRRIGATION DISTRICT,

Defendant-Intervenor-Appellant.

No. 97-16045

D.C. No.
CV 88-1658 LKK

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION; NATIONAL AUDUBON SOCIETY,

Plaintiffs-Appellants,

v.

ROGER PATTERSON, as Regional Director of the U.S. Bureau of Reclamation; BRUCE BABBITT; FRIANT WATER USERS AUTHORITY,

Defendants-Appellees,

and

LOWER TULE RIVER IRRIGATION DISTRICT; PORTERVILLE IRRIGATION DISTRICT; SAUCELITO IRRIGATION DISTRICT; STONE CORRAL IRRIGATION DISTRICT; TEAPOT DOME WATER DISTRICT,

Defendants-Intervenors-Appellees.

No. 97-16173

D.C. No.
CV 88-1658 LKK

Appeals from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Argued and Submitted
December 8, 1997—San Francisco, California

Filed June 24, 1998

Before: Otto R. Skopil, Jr., Dorothy W. Nelson, and
A. Wallace Tashima, Circuit Judges.

Opinion by Judge Tashima

SUMMARY

Environmental Law/Water

The court of appeals affirmed a judgment of the district court in part and reversed in part. The court held that the United States Bureau of Reclamation violates the Endangered Species Act (ESA) by renewing water-supply contracts prior to completing statutorily required consultations with the relevant federal wildlife-conservation agencies.

In the late 1940s, various irrigation and water districts that rely on water from the Friant dam entered into water-service contracts with the federal government. The contracts specified that they would be renewed, on terms to be agreed on, prior to their expiration. In 1956, Congress mandated that contract holders had a right to renewal.

The Bureau of Reclamation determined that contract renewals and recommitment of all the Friant dam's water was not likely to adversely affect winter-run chinook salmon, which was listed as a threatened species. Because the National

Marine Fisheries Service (NMFS) had jurisdiction over the winter-run chinook salmon, the Bureau sought NMFS's concurrence in the Bureau's assessment. In a letter to the Bureau, NMFS disagreed with the Bureau's determination of no adverse impact, but told the Bureau that formal consultation was not required. The Bureau proceeded to execute the water contracts without formal consultation with NMFS.

The Fish and Wildlife Service (FWS) has jurisdiction over several protected species in the Friant dam area. The Bureau consulted informally with FWS. When the Bureau requested formal consultation, FWS issued a "no jeopardy" Biological Opinion. By then, ten of the contracts had been renewed.

The ESA requires federal agencies to consult with relevant wildlife services if the agency determines that its proposed action may affect a threatened or endangered species. Section 7(d) prohibits the irreversible and irretrievable commitment of resources during the consultation process.

By 1992, the Bureau had executed 14 renewal contracts. All of them provided for a 40-year period of water delivery under terms substantially similar to the original contracts. They also contained Article 14, which allowed some contract modification pursuant to environmental review, and all but one contained a provision modifying the terms dependent on the outcome of this litigation.

Appellee Natural Resources Defense Council and other environmental organizations sued the Bureau, alleging that the Bureau violated the Endangered Species Act (ESA) by renewing the water contracts without first preparing an environmental impact statement (EIS); that the Bureau failed to comply with the procedural requirements of the National Environmental Protection Act (NEPA); and violated the Reclamation Act by not complying with California Fish and Game Code § 5937 (requiring dam owners to provide sufficient water to allow passage of fish).

The district court concluded that the contracts amounted to an irreversible and irretrievable commitment of resources, and that all contracts executed prior to completion of the required consultations with FWS and NMFS violated § 7(d) of the ESA. The court denied the plaintiffs' request for an injunction, but ordered the parties to include in the remaining contracts a clause conditioning the terms on the outcome of this case, and concluded that the Bureau could not proceed until FWS found that the contracts were not likely to affect a protected species.

With respect to the claim that the Bureau had violated § 5937, the district court denied the Bureau's motion to dismiss. The court concluded that the Bureau was not exempt from § 5937, and that the Central Valley Project Improvement Act (CVPIA) does not preempt the California statute.

The district court also determined that the FWS Biological Opinion did not moot the procedural ESA violations because its issuance did not provide all the relief that could have been granted. As a remedy, the court concluded that rescission was appropriate and invalidated all the contracts that were executed without ESA consultation.

The irrigation and water districts appealed.

[1] The ESA has explicit substantive goals that are served by its procedural requirements. [2] Judicial review of administrative decisions involving the ESA is governed by the Administrative Procedure Act (APA). A court may set aside an agency action if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or without observance of procedure required by law. [3] The term "agency action" has been defined broadly. Negotiating and executing contracts is "agency action."

[4] The federal reclamation laws state that the government was to renew the contracts on mutually agreeable terms, that

water rights were based on the amount of available water, and that the Secretary of the Interior had discretion to set rates. There was some discretion available to the Bureau during the negotiation process. [5] Even if the original contracts guaranteed a right to available water in the renewal contracts, the Bureau had discretion to alter key terms in the contracts, and might have been able to reduce the amount of water available for sale if necessary to comply with the ESA.

[6] Before initiating action in an area that contains threatened or endangered species or a critical habitat, an agency must make an independent determination of whether its action may affect a protected species or habitat, or initiate a formal consultation with the agency that has jurisdiction over the species. If an agency determines that an action may affect critical species or habitats, formal consultation is mandated. Formal consultation is excused only when an agency determines that its action is unlikely to adversely affect the protected species or habitat, and the relevant service (FWS or NMFS) concurs with the determination.

[7] The issue in this case was whether the Bureau was arbitrary and capricious when it relied on the NMFS's view that a consultation was not necessary, despite NMFS's refusal to provide the required concurrence. By relying on NMFS, the Bureau did not meet its independent responsibilities under the ESA. [8] The Bureau had an affirmative duty to ensure that its actions did not jeopardize endangered species, and the NMFS letter clearly disagreed with the agency's determination of no adverse impact. The district court did not err in concluding that it was arbitrary and capricious for the Bureau to forgo formal consultation with NMFS. All the contracts were subject to rescission.

[9] The Bureau also failed to follow its obligations with respect to its consultation with FWS. [10] An agency should not be permitted to skirt the procedural requirements of § 7(d) by including a catchall savings clause like Article 14 in ille-

gally executed contracts. Even if such a clause could have preserved the contracts, Article 14 was inadequate to serve that purpose because it limited conservation-based modifications to minor adjustments, and prohibited an adjustment in the amount of water delivered. The reasonable and prudent alternative of reallocating water from irrigation to conservation was foreclosed. The district court did not err in concluding that the Bureau violated § 7(d) when it executed the contracts prior to completing formal consultation with FWS.

[11] Procedural violations of the ESA are not necessarily mooted by the FWS finding that a substantive violation of the ESA had not occurred. The process, which was not observed, itself offers valuable protections against the risk of a substantive violation, and ensures that environmental concerns will be factored into the decisionmaking process. Also, due to the procedural violations, the plaintiffs' ability to enjoin the agency action while they challenged the validity of the Biological Opinion was negated.

[12] If the Biological Opinion had been rendered before the contracts were executed, the FWS would have had more flexibility to make, and the Bureau to implement, suggested modifications to the proposed contracts. Even when there is a "no jeopardy" Biological Opinion, the service may make nonbinding conservation recommendations. The failure to respect the process mandated by law cannot be corrected with post-hoc assessments of a "done deal."

[13] When an agency acts arbitrarily or capriciously, or not in accordance with the law, the APA states that the court shall set aside the agency action. While the district court had discretion to preserve the contracts if the procedural flaw could have been rectified in another way, there was no reason to compel that result in this case. [14] An injunction would not have served any purpose if the contracts were not invalidated. The district court's decision to rescind the contracts was not an abuse of discretion.

[15] NEPA requires all federal agencies to consider the environmental consequences of all major federal actions significantly affecting the quality of the human environment by preparing an EIS before undertaking the action. Instead of preparing an EIS, an agency may make a determination that an EIS is unnecessary by conducting an environmental assessment (EA) and issuing a finding of no significant impact on the environment.

[16] The Bureau did not prepare an EA or an EIS. The CVPIA requires the government to complete an EIS before it may enter into any subsequent Friant renewal contracts. When intervening legislative changes settle a controversy, the action may be moot. The NEPA issue was mooted by the remedy of contract rescission and CVPIA's requirement that an EIS be completed on the dam before reexamination of the contracts.

[17] A case is generally considered ripe if the relevant issues are sufficiently focused to permit judicial resolution without further factual development, and the parties would suffer a hardship by the postponement of judicial action. When the Bureau is not complying with § 5937, and its obligation to comply is in dispute, determination of a § 5937 issue is ripe. Rescission of the 14 contracts was unrelated to the timeliness of the § 5937 claim, which was directed to the Bureau, whose duty to comply with state law exists independent of any contractual arrangements.

[18] The CVPIA provides that Friant dam water is not to be released to comply with provisions of the statute regarding the development of a plan to reestablish fish below the dam. There is no clear directive in the CVPIA that preempts application of § 5937 if the state law can be implemented in a way that is consistent with Congress' plan to develop and restore fisheries below the dam.

[19] The district court never ruled that § 5837 applied to the Friant dam. There were other issues that the district court

did not address. These issues had to be remanded for a determination on the merits.

COUNSEL

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OPINION

TASHIMA, Circuit Judge:

Various irrigation and water districts (Non-federal Defendants), that rely on water from the Friant dam, appeal the district court's summary judgment decision that the Bureau of Reclamation (Bureau or Federal Defendant), violated the Endangered Species Act (ESA) by renewing water contracts prior to completing required endangered species consultations. These defendants also appeal the district court's conclusion that Section 8 of the Reclamation Act, 43 U.S.C. § 383, mandates compliance with Section 5937 of the California Fish and Game Code. Various environmental groups led by the National Resources Defense Council (Plaintiffs), cross-appeal the district court's summary judgment decision that the Bureau was not required to comply with National Environmental Policy Act (NEPA) and appeal the dismissal of the Section 8/Section 5937 claim as unripe.

We affirm the district court's holding that the ESA was violated and its decision to rescind the contracts at issue. We remand for a determination on the Section 8/Section 5937 claim.

BACKGROUND

The Central Valley Project (CVP) is a multi-unit reclamation project administered by the Bureau. The Friant dam unit of the CVP was built on the San Joaquin River by the Bureau in the 1940s. Prior to construction of the dam, the San Joaquin River met the Sacramento River at the Sacramento-San Joaquin Delta, where they then flowed out to the Pacific Ocean.

Since the time that the dam was completed, the Friant unit has impounded the San Joaquin River water behind the Friant dam and diverted the water to surrounding irrigation districts. This impoundment and diversion leaves a dry stretch of San Joaquin riverbed.

In the late 1940s, the Non-federal Defendants[1] entered into 40-year Friant water service contracts with the government, pursuant to Section 9(e) of the Reclamation Act of 1939, 43 U.S.C. § 485h(e). The contracts typically provided that they would be renewed no later than one year prior to expiration on terms that "shall be agreed upon." In 1956, Congress mandated that contract holders had a right to renewal "under stated terms and conditions mutually agreeable to the parties." 43 U.S.C. § 485h-1(1). Contract holders had "a first right . . . to a stated share or quantity of the project's available water supply . . . ." 43 U.S.C. § 485h-1(4).

The first of these contracts, the contract with the Orange Cove Irrigation District (Orange Cove), expired in February of 1989. The Bureau began contract renewal negotiations with Orange Cove in June, 1988, and executed a renewal contract in May, 1989. By 1992, the Bureau had executed 13 additional water contracts. All 14 contracts provided for water delivery for a 40-year period under terms substantially similar to those in the previous contracts.

In 1992, Congress enacted the Central Valley Project Improvement Act (CVPIA), Pub. L. No. 102-575, § 3401 et seq., 1992 U.S.C.C.A.N. (106 Stat.) 4600, 4706, which required the government to perform an environmental impact statement (EIS) on the Friant unit before it could execute the remaining renewal contracts. The CVPIA also limited the length of subsequently renewed contracts to 25 years. There-

[1]All of the Non-federal Defendants, except for the Friant Water Users Authority, have water service arrangements with the Bureau.

fore, of the 28 Friant water service contracts that were up for renewal, only the first 14 contracts are at issue.

Prior to construction of the Friant dam, the San Joaquin River supported a variety of fish species, including the chinook salmon. The annual spring floods also fed the surrounding wetlands with fresh water. After the Friant dam was built, the San Joaquin River terminated at the dam, and water from the Sacramento-San Joaquin Delta is exported upstream to water users below the dam through a process of pumping and reverse flows. This situation has adversely affected both wetlands and river fish, including the winter-run chinook salmon. The salmon, which was listed as threatened in August, 1989, and is now endangered, is under the protective jurisdiction of the National Marine Fisheries Service (NMFS). Other listed species under the jurisdiction of the Fish and Wildlife Service (FWS) are also located in the Friant Service Area.

The Plaintiffs filed this action against the Bureau in December, 1988, claiming that the Bureau violated NEPA by renewing the water contracts without first performing an EIS. The Plaintiffs sought a preliminary injunction against further contracts. The district court denied the injunction, but ordered the parties to include in the remaining contracts a clause that conditioned the terms on the final outcome of this case. All the renewal contracts in this case, except for the Orange Cove contract, contain this provision. The contracts also include a clause, entitled "Compliance with Reclamation Laws," which permits minor modifications to the contracts in order to comply with federal law. This clause is known as Article 14.

The Plaintiffs' amended complaint also alleges violations of the ESA, section 8 of the Reclamation Act (§ 8), and section 5937 of the California Fish & Game Code (§ 5937). The Non-federal Defendants were permitted to intervene in 1989.

There are five district court orders that are now at issue:

(1) Order filed April 30, 1992. The district court denied the Defendants' motion to dismiss the § 8/§ 5937 claim. *See* 791 F. Supp. 1425 (E.D. Cal. 1992).

(2) Order filed October 12, 1993. The district court denied the Defendants' motion to dismiss the § 8/§ 5937 claim as mooted or preempted by the CVPIA.

(3) Order filed May 31, 1995. The district court granted the Defendants summary judgment on the NEPA claim, but granted the Plaintiffs summary judgment on the ESA claim.

(4) Order filed January 16, 1997. The district court ordered the 14 contracts rescinded. The court concluded that the § 8/§ 5937 claim was not ripe.

(5) Order filed April 16, 1997. The district court amended the January 16, 1997, judgment and dismissed the Plaintiffs' substantive ESA claim without prejudice.

The Non-federal Defendants argue that: (1) the ESA did not apply to their contracts; (2) but if it did, the ESA was not violated; (3) but if the ESA was violated, the claim is moot; (4) but if there was an ESA violation that was not mooted, the remedy of contract invalidation was inappropriate. The Non-federal Defendants also argue that the CVPIA preempts § 5937. The Plaintiffs cross-appeal the grant of summary judgment to the Defendants on the NEPA claim and they appeal the court's conclusion that the § 8/§ 5937 claim was not ripe. The Bureau is participating in the Plaintiffs' cross-appeal only.[2]

[2]The Bureau does not challenge the district court's determination that there was an ESA violation or the remedy of contract rescission.

DISCUSSION

I. Endangered Species Act

A. Overview

Section 7(a)(2) of the ESA requires all federal agencies "to insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence" of any endangered or threatened species or result in the destruction of critical habitats. 16 U.S.C. § 1536(a)(2). If an agency determines that its proposed action "may affect" an endangered or threatened species, the agency must formally consult with the relevant Service, the FWS and/or the NMFS, depending on the species that are protected in the area of the proposed action. *See Pacific Rivers Council v. Thomas,* 30 F.3d 1050, 1054 n.8 (9th Cir. 1995). After the formal consultation is completed, the relevant Service will issue a Biological Opinion evaluating the nature and extent of effect on the threatened or endangered species. If the Biological Opinion concludes that the proposed action is likely to jeopardize a protected species, the agency must modify its proposal. Section 7(d) of the ESA prohibits the "irreversible or irretrievable commitment of resources" during the consultation process. 16 U.S.C. § 1536(d).

[1] As the district court observed, the ESA has "explicit substantive goal[s] which [are] served by its procedural requirements." Order of May 31, 1995 at 20 (citing *Thomas v. Peterson,* 753 F.2d 754, 763 (9th Cir. 1985)). The district court concluded that the contracts amounted to an "irreversible and irretrievable commitment of resources" and all contracts executed prior to completion of the required consultations with the FWS and the NMFS violated § 7(d). The district court invalidated all of the contracts which had been executed prior to the completion of the required consultations.

[2] Judicial review of administrative decisions involving the ESA is governed by section 706 of the Administrative

Procedure Act, 5 U.S.C. § 706. A court may set aside an agency action if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or if it was found to be "without observance of procedure required by law." 5 U.S.C. § 706(2)(A),(D); *Pyramid Lake Paiute Tribe of Indians v. United States Dep't of the Navy,* 898 F.2d 1410, 1414 (9th Cir. 1990). The district court's summary judgment decision is reviewed de novo. *Forsyth v. Humana, Inc.,* 114 F.3d 1467, 1474 (9th Cir.), *cert. denied,* 118 S. Ct. 559 (1997).

B. Applicability of the ESA

[3] As a threshold question, the Non-federal Defendants argue that the ESA did not apply to the contract renewals because the renewals were not "agency action." *See* 16 U.S.C. § 1536(a)(2). This argument must fail. The term "agency action" has been defined broadly. In *TVA v. Hill,* 437 U.S. 153 (1978), the Court stated:

> One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence" of an endangered species or "result in the destruction or modification of habitat of such species. . . ." This language admits of no exception.

Id. at 173. *See also Pacific Rivers,* 30 F.3d at 1055 ("Following the Supreme Court's lead in *TVA,* we have construed 'agency action' broadly.") The regulation defining agency action states:

> Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies. . . . Examples include, but

> are not limited to: . . . the granting of licenses, contracts, leases, easements, rights-of-way, permits or grants in aid.

50 C.F.R. § 402.02. Clearly, negotiating and executing contracts is "agency action."

[4] Orange Cove, the Madera Irrigation District (Madera) and Chowchilla Water District (Chowchilla) contend that the Bureau had no discretion to alter the terms of the renewal contracts, particularly the quantity of water delivered.[3] Where there is no agency discretion to act, the ESA does not apply. *Sierra Club v. Babbitt,* 65 F.3d 1502, 1509 (9th Cir. 1995). The federal reclamation laws, which provided the right to renewal, state that the government is to renew the contracts on "mutually agreeable" terms, 43 U.S.C. § 485h-1(1), that water rights are based on the amount of available project water, 43 U.S.C. § 485h-1(4), and that the Secretary of the Interior (Secretary) has the discretion to set rates to cover an appropriate share of the operation and maintenance costs, 43 U.S.C. § 485h(e). Clearly, there was some discretion available to the Bureau during the negotiation process.

[5] Orange Cove points to the opinion of the Solicitor of the Interior that the Bureau had no discretion for purposes of a NEPA analysis. Orange Cove argues that this opinion was entitled to deference. The opinion, however, only addresses the applicability of NEPA, not the ESA. Even if this opinion were relevant, the district court correctly concluded that the Solicitor's opinion was inconsistent with the requirements of the ESA. First, the opinion began from the premise that the government did not intend to make any substantial changes in the renewal contracts. The Solicitor, however, *did not* conclude that there was no discretion to change the terms of the contracts. He wrote:

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[3]This issue was raised for the first time on a motion for reconsideration which the district court addressed in its Jan. 16, 1997, Order.

> If the Secretary exercises his discretion to make other substantial changes in the contracts at the time of renewal, then analysis must be undertaken to determine whether the exercise of discretion qualifies for a categorical exclusion from preparation analysis under NEPA. . . . [While there is no discretion to alter the quantity of water received . . . the] Secretary has considerable discretion, however, to change other terms of the renewed contracts.

The Solicitor concluded that there was no discretion to change the quantity of water delivered under the contracts because the districts have "a first right . . . to a stated share or quantity of the project's available water supply. . . ." (Citing 43 U.S.C. § 485h-1(4)). The Solicitor, however, assumed that the "project's *available* water supply" included all of the Friant dam water, and he did not address the issue of whether the total amount of available project water could be reduced in order to comply with the ESA or state law. *See O'Neill v. United States*, 50 F.3d 677, 686 (9th Cir. 1995) (noting that an agency can deliver less than a contractually agreed upon amount of water in order to comply with subsequently enacted federal law). Therefore, even if the original contracts guaranteed the Non-federal Defendants a right to a similar share of available water in the renewal contracts, the Bureau had discretion to alter other key terms in the contract, and the Bureau may be able to reduce the amount of water available for sale if necessary to comply with ESA.

C. Procedural Violations of the ESA

1. Failure to Consult with the NMFS

[6] Before initiating any agency action in an area that contains threatened or endangered species or a critical habitat, the agency must (1) make an independent determination of whether its action "may affect" a protected species or habitat, or (2) initiate a formal consultation with the agency that has

jurisdiction over the species. *See generally Peterson,* 753 F.2d at 763. If an agency determines that an action "may affect" critical species or habitats, formal consultation is mandated. *Id.*; 50 C.F.R. § 402.14(a). Formal consultation is excused only where (1) an agency determines that its action is unlikely to adversely affect the protected species or habitat, *and* (2) the relevant Service (FWS or NMFS) concurs with that determination. 50 C.F.R. § 402.14(b); *see Pacific Rivers,* 30 F.3d at 1054, n.8.

The NMFS has jurisdiction over the winter-run chinook salmon, which was listed as a threatened species prior to execution of all but one of the water contracts. The Bureau independently determined that the renewal contracts and recommitment of all the Friant dam's water were not likely adversely to affect the salmon. The Bureau then sought the NMFS' concurrence with that assessment. On November 1, 1991, the Director of the NMFS refused to concur in the Bureau's opinion that the salmon would not be adversely affected. However, the NMFS also stated that formal consultation was not required. The Director wrote:

> While we disagree with the Bureau's determination that renewal of the Friant contracts are not likely to affect the winter-run [chinook salmon] adversely . . . we do not believe that a formal consultation on the Friant contract renewals is necessary. . . . [T]he issue of delta exports is being addressed in our ongoing consultation on the CVP. . . and we believe this will allow us to address the adverse impacts from the activities interrelated to the renewal of the Friant contracts.

The Bureau then proceeded to execute the water contracts without requesting a formal consultation with the NMFS. The Bureau argued that it reasonably relied on the NMFS' determination that a formal consultation was unnecessary.

[7] The Non-federal Defendants cite *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442 (9th Cir. 1984), and *Pyramid Lake*, 898 F.2d 1410, to support their argument that the Bureau's reliance on the NMFS opinion was not arbitrary and capricious. These cases, however, do not support the Non-federal Defendants' position. Unlike both *Stop H-3* and *Pyramid Lake*, the issue in this case is not whether the Bureau was arbitrary and capricious in relying on a properly issued Biological Opinion. Instead, the issue is whether the Bureau was arbitrary and capricious when it relied on the NMFS' view that a consultation was not necessary, despite NMFS' refusal to provide the required concurrence. By relying on the NMFS in this case, the Bureau did not meet its independent responsibilities under the ESA.

[8] The Bureau had an affirmative duty to ensure that its actions did not jeopardize endangered species, and the NMFS letter clearly disagreed with the agency's determination of no adverse impact. *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14. Under those circumstances, regardless of the NMFS position that a formal consultation was "unnecessary," the Bureau had a clear legal obligation to at least request a formal consultation. *See* 50 C.F.R. §§ 402.13, 402.14. The reason that the NMFS gave for stating that a consultation was unnecessary was not supported by statute or regulation and had no rational relationship to the Bureau's independent obligations to ensure that its proposed actions were not likely adversely to affect the salmon. The district court did not err in concluding that it was arbitrary and capricious for the Bureau to forgo a formal consultation with the NMFS where the NMFS specifically refused to provide the required concurrence of "no adverse impact." Where the Bureau executed these 40-year contracts without first obtaining either the required concurrence from NMFS that the proposed action was not likely to affect a threatened species or a properly issued NMFS "no jeopardy" Biological Opinion, the Bureau acted arbitrarily and capriciously and not in accordance with the law. Therefore, all of these contracts were subject to rescission.

2. Untimely Consultation with the FWS

[9] In addition to failing to request and follow through with a required consultation with NMFS, the Bureau also failed to follow its obligations under law with respect to its consultation with the FWS. The FWS has jurisdiction over several protected species in the Friant area, and the Bureau informally consulted with the FWS during 1990 and 1991. Formal consultation was requested on May 22, 1991. The FWS issued a "no jeopardy" Biological Opinion on October 15, 1991. Ten of the Friant contracts had already been executed by that time. The contracts contained Article 14, which allowed some contract modification pursuant to environmental review, and all but one of the contracts contained a provision modifying the terms dependent on the outcome of this litigation.[4]

Section 7(d) of the ESA provides:

> After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

16 U.S.C. § 1536(d); *see* 50 C.F.R. § 402.09. The district court concluded that the 40-year water contracts constituted an irreversible and irretrievable commitment of resources and

[4]The Orange Cove contract did not include this provision. That contract was the first contract renewed and it was executed prior to the court's order requiring all future contracts to contain such a provision. However, the Bureau and the FWS had informally consulted and mutually agreed that the Orange Cove contract was not likely adversely to affect any listed species.

that the Bureau was not permitted to proceed until FWS found that the contracts were not likely to affect a protected species.[5] *See Pacific Rivers*, 30 F.3d at 1056 (following discussion of § 7(a)(2) and § 7(d), court concluded that "timber sales constitute per se irreversible and irretrievable commitment of resources"); *Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290, 295 (9th Cir. 1992).

[10] The Non-federal Defendants insist that even if the water contracts are an irreversible and irretrievable commitment of resources, Article 14 prevented the foreclosure of reasonable and prudent alternatives and, therefore, § 7(d) was not violated. We do not think that an agency should be permitted to skirt the procedural requirements of § 7(d) by including such a catchall savings clause in illegally executed contracts. However, even if such a clause could preserve the contracts, Article 14 is inadequate to serve that purpose here because it limits conservation-based modifications to minor adjustments and prohibits an adjustment in the amount of water delivered. Because Article 14 does not permit a reduction in the quantity of water delivered, the reasonable and prudent alternative of reallocating contracted water from irrigation to conservation is foreclosed. The district court did not err in concluding that the Bureau violated § 7(d) when it executed the contracts prior to completing the formal consultation process with the FWS, and the contracts executed prior to the issuance of the FWS Biological Opinion are subject to rescission.[6]

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[5]The district court also concluded that there was a *per se* violation of the ESA even if the contracts in this case were not an irreversible and irretrievable commitment of resources. We need not decide whether the district court was mistaken because there was an irreversible and irretrievable commitment of resources.

[6]The district court also correctly concluded that if the Bureau is not permitted to execute contracts that constitute an irreversible and irretrievable commitment of resources *during* the formal consultation, it also was not permitted to do so *before* it had initiated formal consultation. *See* 16 U.S.C. § 1536(d); *Pacific Rivers*, 30 F.3d at 1056-57; *Conner v. Burford*, 848 F.2d 1441, 1455 (9th Cir. 1988). Therefore, all contracts executed prior to May 22, 1991, violated the ESA.

3. Mootness

The Non-federal Defendants argue that if the Bureau violated the ESA by executing the water contracts prior to the issuance of the FWS Biological Opinion, this claim became moot once a "no jeopardy" biological Opinion was issued on October 15, 1991.[7] In the May 31, 1991, Order, the district court concluded that the Biological Opinion did not moot the procedural ESA violations because the issuance of the Biological Opinion did not provide all the relief that could have been granted. The district court concluded that an appropriate remedy was still available — contract rescission — which would place the Plaintiffs in the position they would have been had the ESA been complied with before execution of the contracts.

Mootness is a question of law reviewed de novo. *Native Village v. Blatchford,* 38 F.3d 1505, 1509 (9th Cir. 1994). The Non-federal Defendants rely on *Southern Utah Wilderness Alliance v. Smith,* 110 F.3d 724 (10th Cir. 1997), as persuasive authority that the ESA claim was mooted. In *Southern Utah* an informal consultation completed after the agency action mooted the ESA claim. However, *Southern Utah* is distinguishable because (1) there was no irreversible and irretrievable commitment of resources, and (2) the only relief requested was the completed consultation.

[11] Procedural violations of the ESA are not necessarily mooted by a finding by the FWS that a substantive violation of the ESA had not occurred. The process, which was not observed here, itself offers valuable protections against the *risk* of a substantive violation and ensures that environmental concerns will be properly factored into the decision-making

[7]This argument only applies to the ESA violation arising out of the FWS consultation process. Even if the untimely FWS consultation could be mooted by the issuance of a "no jeopardy" opinion, the failure to consult with NMFS still renders the contracts subject to rescission.

process as intended by Congress. Also, due to the procedural violations here, the Plaintiffs' ability to enjoin the agency action while they challenged the validity of the Biological Opinion was negated.[8]

[12] Here, if the Biological Opinion had been rendered before the contracts were executed, the FWS would have had more flexibility to make, and the Bureau to implement, suggested modifications to the proposed contracts. *See* 50 C.F.R. § 402.14(g)(6), (j) (Service's responsibilities include formulating "discretionary conservation recommendations, if any, which will assist . . . agency in reducing or eliminating the impacts it may have on listed species or critical habitats"). Even where there is a "no jeopardy" Biological Opinion, the Service may make non-binding conservation recommendations. 50 C.F.R. § 402.14(g)(6), (j). The failure to respect the process mandated by law cannot be corrected with post-hoc assessments of a done deal.

D. Remedy of Contract Rescission

[13] Where an agency acts arbitrarily or capriciously or not in accordance with the law, the APA states that the court shall set aside the agency action. 5 U.S.C. § 706(2)(A)-(D). While the court had the discretion to preserve the contracts if the procedural flaw could have been rectified in another way, *see Weinberger v. Romero-Barcelo,* 456 U.S. 305, 320 (1982), there is no reason to compel that result here.

[14] In *Bob Marshall Alliance v. Hodel,* 852 F.2d 1223, 1230 (9th Cir. 1988), the court stated that "the proper remedy for substantial procedural violations of NEPA and the ESA is an injunction." In that case, however, the government had been enjoined by the district court from entering into more

[8]In the district court, the Plaintiffs challenged the validity of the FWS "no jeopardy" Biological Opinion. This claim was dismissed without prejudice because the contract rescission offered complete relief.

leases and the leases that were already entered into were set aside. Also, the agency action at issue did not appear to involve an irreversible and irretrievable commitment of resources. In *Forelaws on Board v. Johnson*, 743 F.2d 677, 685 (9th Cir. 1984), although we refused to issue an injunction, we noted that for NEPA violations, injunctions served the purpose of "preserv[ing] the decision makers' opportunity to choose among policy alternatives." *Id.* Where contracts have already been entered into, the opportunity to "choose" has been eliminated — all that remains is the limited ability to make the path chosen as palatable as possible. Therefore, an injunction would not serve any purpose if the contracts are not invalidated. We conclude that the district court's decision to rescind the contracts was not an abuse of discretion.

E. Unique Issues Related to Particular Contracts

1. Orange Cove

Orange Cove is uniquely situated from the rest of the Non-federal Defendants. First, the Orange Cove contract was the only contract that was executed after the Bureau and the FWS had concurred that the contract was not likely adversely to affect any protected species. Therefore, for the Orange Cove contract alone, a formal consultation with the FWS was not required before contract execution and the ESA was not violated on those grounds.

The district court concluded, however, that even though the ESA was not violated because of a flawed FWS consultation, the failure to consult with the NMFS before executing the Orange Cove contract resulted in a procedural violation. The Orange Cove contract, however, was also the only contract executed before the winter-run chinook salmon was listed as threatened in August of 1989. Orange Cove argues that because its contract was executed before the salmon was listed, the Bureau had no duty to consult with the NMFS, formally or informally, under the ESA.

The district court, on Orange Cove's motion for reconsideration, concluded that until Orange Cove had the contract validated in state court,[9] the Bureau had the power and the obligation to withdraw the contract and initiate consultation with the NMFS after the salmon was listed in August, 1989. Orange Cove argues that the district court improperly decided the validation argument because it was not addressed by the parties in their summary judgment briefs. Orange Cove also argues that the district court erred as a matter of law.

Orange Cove implicitly raised the validation argument when it moved for reconsideration and pointed out to the court that its contract was executed prior to the threatened species listing. The Orange Cove contract, on its face, states that it is not binding on the United States until it is validated in state court. Both sides had an opportunity to address this argument in writing a year before the district court issued its January 16, 1997, Order.

Orange Cove argues that after the contract was executed in May, 1989, there was no "agency action" that would require reinitiation of an ESA consultation. However, even though the government was not under a contractual obligation to deliver water to Orange Cove from February 28, 1989, until February 22, 1990, the government continued to do so and that activity constituted discretionary agency action. The ESA regulations

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[9]Clause 30 of the Orange Cove contract provides as follows:

> The Contractor, after execution of this contract, shall promptly seek to secure a decree of a court of competent jurisdiction of the State of California, confirming the execution of this contract. The Contractor shall furnish the United States a certified copy of the final decree, the validation proceedings, and all pertinent supporting records of the court approving and confirming this contract, and decreeing and adjudging it to be lawful, valid, and binding on the Contractor. *This contract shall not be binding on the United States until such final decree has been secured.*

Contract between the United States and the Orange Cove Irrigation District (emphasis added).

state that "[r]einitiation of formal consultation is required and shall be requested . . . where discretionary Federal involvement or control over the action has been retained or is authorized by law and . . . a new species is listed . . . ." 50 C.F.R. § 402.16. The discretionary activity of delivering water without a contract, coupled with the fact that the Orange Cove contract explicitly stated that the United States was not bound by the contract until it was validated in state court, support the district court's conclusion that the Bureau had an obligation to withdraw the contract and initiate an NMFS consultation once the salmon was listed. *See Pacific Rivers*, 30 F.3d at 1053-56 (ESA consultation required for ongoing projects once new threatened species listed). We conclude that the district court did not err in setting aside the Orange Cove contract.

2. Chowchilla and Madera

Chowchilla and Madera argue that their contracts are unique from the other Non-federal Defendants because Madera and Chowchilla had originally possessed the land where the Friant dam was built and had adjudicated rights to the water of the San Joaquin River. In return for conveying the land and the water rights to the United States, Madera and Chowchilla argue that their 1939 contracts guaranteed a permanent supply of water from the Friant dam of 270,000 acre feet of water annually. That contract was replaced by a 1951 contract. Madera and Chowchilla argue that when the 1951 contract expired, they were reinvested with their rights under the 1939 contract and, therefore, they are exempt from the ESA. However, in *Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1405-06 (9th Cir. 1993), the court concluded that these districts are not exempt from requirements under NEPA and the ESA. Chowchilla's and Madera's arguments to the contrary are without merit.

3. Chowchilla, Terra Bella and Delano-Earlimart

Chowchilla, the Terra Bella Irrigation District and the Delano-Earlimart Irrigation District argue that even though

their contracts were executed by the Bureau prior to the issuance of the FWS Biological Opinion, all three were validated by the state court after the October 15, 1991, "no jeopardy" Biological Opinion was issued. Therefore, they argue that the validation date serves to keep their contracts from violating the ESA.

This argument was not raised in the district court and we decline to consider it for the first time on appeal. *See Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1487 n.4 (9th Cir. 1995) (failure to raise issue before the district court constitutes a waiver of that issue).

II. National Environmental Policy Act

[15] NEPA requires all federal agencies to consider the environmental consequences of all "major Federal actions significantly affecting the quality of the human environment" by preparing an EIS before undertaking the action. 42 U.S.C. § 4332(2)(C). Instead of preparing an EIS, an agency may make a factual determination that an EIS is unnecessary by conducting an environmental assessment (EA) of its proposed action and issuing a Finding of No Significant Impact (FONSI) on the environment. *See* 40 C.F.R. § 1501.4; *Sierra Club v. United States Forest Serv.*, 843 F.2d 1190, 1193 (9th Cir. 1988). NEPA is not retroactive and only applies to major agency actions that occurred after 1969.

[16] It is undisputed that the Bureau did not prepare an EA or an EIS before renewing these water contracts. The Bureau argues that there is no need for this court to address the NEPA issue because if these 14 contracts are rescinded, then the Plaintiffs have received complete relief. The CVPIA requires the government to complete an EIS before it may enter into any subsequent Friant renewal contracts. CVPIA, Pub. L. 102-575, § 3404(c)(1), 1992 U.S.C.C.A.N. (106 Stat.) at 4709. Where intervening legislative changes settle a controversy, the action may be moot. *Nevada v. Watkins*, 943 F.2d

1080, 1083 (9th Cir. 1991). We conclude that the NEPA issue has been mooted by the remedy of contract rescission and CVPIA's requirement that an EIS be completed on this dam before the re-execution of the contracts.

III. Section 5937 of the Fish and Game Code

Section 5937 of the California Fish and Game Code states:

> The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam.

In the Order of April 30, 1992, the district court concluded that the Bureau was not exempt from § 5937 and denied the motion to dismiss. *See* 791 F. Supp. at 1431-36. The district court also concluded that the CVPIA did not preempt § 5937. *See* Order of October 7, 1993. In the January 16, 1997, Order, the district court concluded that, due to the contract invalidations, the § 5937 claim was not ripe. We hold that the district court erred and remand for a determination on the merits.

[17] Ripeness is a question of law reviewed de novo. *San Diego County Gun Rights Comm. v. Reno,* 98 F.3d 1121, 1124 (9th Cir. 1996). A case is generally considered ripe if: (1) the relevant issues are sufficiently focused to permit judicial resolution without further factual development, *see Clinton v. Acequia, Inc.,* 94 F.3d 568, 572 (9th Cir. 1996); and (2) the parties would suffer a hardship by the postponement of judicial action, *see Abbott Lab. v. Gardner,* 387 U.S. 136, 149 (1967). Where the Bureau is not complying with § 5937 and its obligation to comply with § 5937 is in dispute, a determination of the § 5937 issue is ripe. The rescission of the 14 water contracts is unrelated to the timeliness of the § 5937 claim. The § 5937 claim is directed towards the owner of the

dam, the Bureau, whose duty to comply with state law, if the law applies, exists independent of any contractual arrangements with the Non-federal Defendants.

The Non-federal defendants challenge the district court's ruling that § 5937 was not, on its face, preempted by federal law. We affirm on the facial preemption issue.

Section 8 of the Reclamation Act provides:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws . . . .

43 U.S.C. § 383. In *California v. United States,* 438 U.S. 645 (1978), the Court stated that the "cooperative federalism" of § 8 required the United States to comply with state water laws unless such a law was directly inconsistent with clear congressional directives regarding the project. *Id.* at 650, 678. On remand to the Ninth Circuit, this court concluded that the term "congressional directive" meant a preemptive federal statute. *United States v. California,* 694 F.2d 1171, 1176-77 (9th Cir. 1982).

[18] The CVPIA provides that Friant dam water is not to be released from the Friant dam to comply with the provisions of the CVPIA regarding the development of a plan to reestablish fish below the dam. CVPIA, Pub. L. No. 102-575, § 3406(c)(1), 1992 U.S.C.C.A.N. (106 Stat.) at 4721.[10] The

[10]Section 3406(c)(1) of the CVPIA provides:

> The Secretary shall . . . develop a comprehensive plan, which is reasonable, prudent, and feasible, to address fish, wildlife, and

Non-federal Defendants argue that this provision is a clear congressional directive that water is not to be released from the Friant dam pursuant to any law, state or federal, until it is specifically approved by Congress. However, the statute states that there are not to be any releases of the Friant dam water "as a measure to implement this title," this title being the CVPIA. It would have been a simple matter for Congress to bar the release of Friant dam water, without including the clause "as a measure to implement this title" twice in the same sentence. There is no clear directive in the CVPIA which preempts the application of § 5937 if the state law could be implemented in a way that is consistent with Congress' plan to develop and restore fisheries below the Friant dam in a manner that is "reasonable, prudent, and feasible." CVPIA, Pub. L. 102-575, § 3406(c), 1992 U.S.C.C.A.N. (106 Stat.) at 4721.

[19] The district court, as the Bureau points out, never explicitly ruled that § 5937 applied to the Friant dam. There are several other issues that the district court did not address. For example, the district court did not determine whether § 5937 is applicable to the Friant dam under state law. It is preferable to determine whether the state law applies before reaching a determination that state law has been preempted. The district court also did not reach the issue of whether the actual application of § 5937 is inconsistent with the CVPIA. It has yet to be determined how much water release would be required under § 5937 and whether that would be consistent with the CVPIA. We remand these issues to the district court for a determination on the merits.

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habitat concerns on the San Joaquin River . . . During the time that the Secretary is developing the plan provided for in this subsection, and until such time as Congress has authorized the Secretary to implement such plan . . . the Secretary shall not, as a measure to implement this title, make releases for the restoration of flows between Gravelly Ford and the Mendota Pool and shall not thereafter make such releases as a measure to implement this title without a specific Act of Congress authorizing such releases.

IV. Improper Use of Evidence

With their summary judgment motion, the Plaintiffs filed three expert affidavits which addressed the environmental impacts of the Friant dam. The Non-federal Defendants filed a motion to strike these affidavits which the court denied. The Non-federal Defendants claim that these affidavits addressed disputed factual issues, and that they were not permitted to cross-examine the experts or conduct discovery to respond to the assertions in the affidavits. In the Order of May 31, 1995, the district court appears to rely on these affidavits, in part, and stated that the Plaintiffs' "extensive scientific ecological evidence documents" indicated that the total diversion of the river caused environmental harm. The Non-federal Defendants contend that the district court abused its discretion in denying further discovery in violation of Fed.R.Civ.P. 56(f). The Non-federal Defendants also claim that the affidavits were irrelevant to the legal questions at hand.

We review the district court's discovery rulings for an abuse of discretion. *Amarel v. Connell,* 102 F.3d 1494, 1515 (9th Cir. 1996). The district court may continue a motion for summary judgment if the opposing party needs time to conduct further discovery. *See* Fed.R.Civ.P. 56(f); *Garrett v. City and County of San Francisco,* 818 F.2d 1515, 1518 (9th Cir. 1987). A refusal to permit further discovery pursuant to Rule 56(f) is reviewed for an abuse of discretion. *Nidds v. Schindler Elevator Corp.,* 113 F.3d 912, 920 (9th Cir. 1996), *cert. denied* 118 S. Ct. 369 (1997). "We will only find that the district court abused its discretion if the movant diligently pursued its previous discovery opportunities, and if the movant can show how allowing additional discovery would have precluded summary judgment." *Qualls v. Blue Cross of Cal., Inc.,* 22 F.3d 839, 844 (9th Cir. 1994).

The Non-federal Defendants' Rule 56(f) argument is without merit. The Non-federal Defendants never formally filed a Rule 56(f) motion requesting a continuance of the summary

judgment hearing to conduct further discovery. They contend that their motion to strike should have served as a Rule 56(f) motion. But that motion, which was not made until six months after the summary judgment decision was issued, was clearly untimely for Rule 56(f) purposes. Regardless of whether the Non-federal Defendants raised a timely 56(f) motion or diligently pursued discovery, the Non-federal Defendants have not pointed to any evidence that they could have discovered that would have precluded summary judgment. *See Garrett,* 818 F.2d at 1518.

On the relevancy issue, the Plaintiffs assert that the expert affidavits were relevant to the legal issue of whether the water contracts were an irreversible and irretrievable commitment of resources. The district court did rely on the declarations regarding environmental harm to conclude that there was an irreversible and irretrievable commitment of resources. However, it appears that the court could have reached the same legal conclusion without any concrete evidence of ecological harm. *See Pacific Rivers,* 30 F.3d at 1057 (timber sales constitute per se irreversible and irretrievable commitment of resources). Therefore, if there were any error it was harmless.

CONCLUSION

We conclude that the Bureau violated the ESA by making irreversible and irretrievable commitments of resources prior to completing the required consultations with the FWS and the NMFS. The remedy of contract rescission was well within the district court's discretion. The NEPA issue is moot. However, we reverse the holding that the § 5937 claim was unripe and remand for a determination of that issue. The Plaintiffs shall recover their costs on appeal from the Non-federal Defendants. The Federal Defendants shall bear their own costs on appeal.

AFFIRMED in part, REVERSED and REMANDED in part.

APPENDIX B.

APPROPRIATE ORDERS OF THE DISTRICT COURT

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OF THE DISTRICT COURT

For Appropriate Orders of the District Court, Petitioners adopt the Appendix attached to the Petition For Writ of Certiorari filed on behalf of Friant Water Users Authority, et al.

APPENDIX C.

CONSTITUTIONAL PROVISIONS AND STATUTES

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FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shell be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

For all other Federal and State Statutes, Petitioners adopt the Appendix attached to the Petition For Writ of Certiorari filed on behalf of Friant Water Users Authority, et al.

Supreme Court, U.S.
FILED
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Nos. 98-926 and 98-1018

In the Supreme Court of the United States

OCTOBER TERM, 1998

LOWER TULE RIVER IRRIGATION DISTRICT, ET AL., PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, ET AL.

CHOWCHILLA WATER DISTRICT AND MADERA IRRIGATION DISTRICT, PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 3406(c)(1) of the Central Valley Project Improvement Act, Pub. L. No. 102-575, 106 Stat. 4721-4722, which sets out a federal program concerning the reestablishment of flows in the San Joaquin River below the Friant Unit of the Central Valley Project, facially preempts the possible application of a California statute which provides that the owner of any dams shall allow sufficient water to pass over, around, or through the dam to keep in good condition any fish that may be planted or exist below the dams.

2. Whether the Bureau of Reclamation, Department of the Interior, complied with consultation requirements of the Endangered Species Act, 16 U.S.C. 1531 *et seq.*, in connection with the renewal of certain long-term water supply contracts for water from the Friant Unit.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-926

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-37)[1] is reported at 146 F.3d 1118. The district court's order of April 30, 1992, is reported at 791 F. Supp. 1425. The

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[1] Unless otherwise noted, references to "Pet." and "Pet. App." are to the petition and appendix in No. 98-926.

district court's orders of October 12, 1993 (Pet. App. 38-88), May 3, 1995 (Pet. App. 89-137), January 16, 1997, and April 16, 1997, are unreported.

JURISDICTION

The court of appeals entered its judgment on June 24, 1998. Petitions for rehearing were denied on September 8, 1998. Pet. App. 138. The petitions for a writ of certiorari were filed on December 7, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This litigation concerns the operations of the Friant Unit of the Central Valley Project (CVP), a federal reclamation project located in California and administered by the Bureau of Reclamation (Bureau), an agency within the Department of the Interior. The suit also involves the renewal of long-term contracts for the delivery of CVP water to water districts in the Friant Unit of the CVP (Friant Unit renewal contracts).

1. The construction of the CVP began under a presidential allocation of funds appropriated by the Emergency Relief Appropriation Act of 1935, ch. 48, 49 Stat. 115. The CVP was subsequently reauthorized by Section 2 of the Act of August 26, 1937, ch. 832, 50 Stat. 850.

This Court described the CVP's essential features and operations in *Dugan* v. *Rank*, 372 U.S. 609, 611-614 (1963); *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 279-287 (1958); and *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 727-730 (1950). In brief, Friant Dam, situated above Gravelly Ford on the upper San Joaquin River in the southern Central Valley of California, impounds and stores the river's waters behind the dam in Millerton Lake. Since at least the early 1950s, virtually the entire flow of the river has

been diverted at the dam for storage of the water and for the delivery of water to CVP contractors via the Madera and Friant-Kern Canals, or directly from the lake, for beneficial use in the southern Central Valley area.

Prior to the Friant Unit's construction, various entities held water rights on the San Joaquin River downstream from Gravelly Ford. The United States agreed to provide substitute water to certain of those entities. See *Westlands Water Dist.* v. *Firebaugh Canal*, 10 F.3d 667, 669 (9th Cir. 1993). CVP facilities in the northern Central Valley store waters of the Sacramento, Trinity, and American Rivers. Those waters are released when needed and flow south down the Sacramento River to the Sacramento-San Joaquin Delta, east of San Francisco. The waters are then diverted from the Delta by the Tracy Pumping Plant for conveyance by the Delta-Mendota Canal to the canal's southern terminus at the Mendota Pool. That arrangement, however, leaves the stretch of the San Joaquin River between Gravelly Ford and the Mendota Pool essentially dewatered.

2. Beginning in the late 1940s, the Bureau, acting pursuant to Section 9(e) of the Reclamation Project Act of 1939, ch. 418, 53 Stat. 1196, 43 U.S.C. 485h(e), entered into 40-year water service contracts to supply 28 entities with water from the Friant Unit. The contract with the Orange Cove Irrigation District (OCID) was the first of those contracts due to expire, on February 28, 1989. The Bureau therefore commenced contract renewal negotiations with the Friant contractors in June 1988. In November 1988, the Bureau announced completion of negotiations with OCID. The OCID contract was renewed in May 1989, after this litigation had been initiated. The Bureau

subsequently entered into 13 additional renewed long-term Friant Unit water service contracts. All 14 of those renewal contracts[2] provided for water delivery for 40-year periods in amounts essentially identical to those provided for by the previous contracts. See Pet. App. 10-11, 39.

3. The Central Valley Project Improvement Act (CVPIA), Pub. L. No. 102-575, Tit. XXXIV, 106 Stat. 4706 (Pet. App. 147-212), was signed into law on October 30, 1992, several years after this suit was filed. The CVPIA was enacted for the purpose, *inter alia*, of "achiev[ing] a reasonable balance among competing demands for use of [CVP] water, including the requirements of fish and wildlife, agricultural, municipal and industrial and power contractors." CVPIA § 3402(f), 106 Stat. 4706 (Pet. App. 162).

Section 3404(c) of the CVPIA limits the renewal term of long-term renewal contracts that had not been previously renewed to a maximum period of 25 years. 106 Stat. 4708-4709 (Pet. App. 167). In addition, Section 3404(c)(1) provides that no 25-year renewal contract may be executed until after the completion of the environmental review required by, *inter alia*, CVPIA § 3409.[3] Pending the completion of that review, the

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[2] Those contracts are referred to as "renewal contracts" because the Act of July 2, 1956, ch. 492, 70 Stat. 483, 43 U.S.C. 485h, provides for "rights of renewal" for contracts issued under Section 9(e) of the Reclamation Project Act of 1939, 43 U.S.C. 485h(e). The original Friant contracts were Section 9(e) contracts.

[3] CVPIA § 3409 states that "the Secretary shall prepare and complete a programmatic environmental impact statement * * * analyzing the direct and indirect impacts and benefits of implementing this title, including all fish, wildlife, and habitat restoration actions and the potential renewal of all existing Central Valley Project water contracts." 106 Stat. 4730 (Pet. App. 210).

Bureau is restricted to issuing initial interim renewal contracts of no more than three years, followed by successive interim renewal contracts of no more than two years. CVPIA § 3404(c)(1), 106 Stat. 4709 (Pet. App. 167-168).

Section 3406(b) of the CVPIA directs the Bureau to operate the CVP "to meet all obligations under State and Federal law, including but not limited to the Federal Endangered Species Act, 16 U.S.C. 1531, et seq., and all decisions of the California State Water Resources Control Board establishing conditions on applicable licenses and permits for the project." 106 Stat. 4714 (Pet. App. 178). The Bureau is also directed to develop and implement "a program which makes all reasonable efforts to ensure that, by the year 2002, natural production of anadromous fish in Central Valley rivers and streams will be sustainable, on a long-term basis, at levels not less than twice the average levels attained during the period of 1967-1991." CVPIA § 3406(b)(1), 106 Stat. 4714 (Pet. App. 178). Section 3406(b)(1) further provides, however, that "this goal shall not apply to the San Joaquin River between Friant Dam and the Mendota Pool, for which a separate program is authorized under subsection 3406(c)." 106 Stat. 4714 (Pet. App. 178-179).

Under the "separate program" set out in CVPIA § 3406(c)(1), the Secretary is directed to

> develop a comprehensive plan, which is reasonable, prudent, and feasible, to address fish, wildlife, and habitat concerns on the San Joaquin River, including but not limited to the streamflow, channel, riparian habitat, and water quality improvements that would be needed to reestablish where necessary and to sustain naturally reproducing anadro-

mous fisheries from Friant Dam to its confluence with the San Francisco Bay/Sacramento-San Joaquin Delta Estuary.

106 Stat. 4721 (Pet. App. 191-192). Section 3406(c)(1) further provides that the Secretary may not make releases from Friant Dam "as a measure to implement this title" absent further congressional authorization.[4] Finally, Section 3406(c)(1) establishes a special surcharge to be paid by purchasers of Friant Unit water, which will remain in effect until the flows necessary to meet the anadromous fish needs identified in the Section 3406(c)(1) plan are provided. 106 Stat. 4722 (Pet. App. 192).

4. Congress enacted the Endangered Species Act of 1973 (ESA) to protect and conserve endangered and threatened species. 16 U.S.C. 1531(b). To accomplish that goal, Congress directed the Secretaries of Commerce and the Interior to list threatened and endangered species. See 16 U.S.C. 1533.[5] Section 7(a)(2)

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[4] The pertinent sentence states:

> During the time that the Secretary is developing the plan provided for in this subsection, and until such time as Congress has authorized the Secretary to implement such plan, with or without modifications, the Secretary shall not, as a measure to implement this title, make releases for the restoration of flows between Gravelly Ford and the Mendota Pool and shall not thereafter make such releases as a measure to implement this title without a specific Act of Congress authorizing such releases.

106 Stat. 4721 (Pet. App. 192).

[5] The Secretary of the Interior and the Secretary of Commerce share responsibility for listing species and for other ESA duties. See 16 U.S.C. 1532(15). The Secretary of the Interior implements the ESA through the Fish and Wildlife Service (FWS) with respect to the species under his jurisdiction. See 50 C.F.R.

of the ESA requires that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2).

Regulations promulgated jointly by the two Secretaries furnish a structure for consultation. See 50 C.F.R. Pt. 402; see also 16 U.S.C. 1536(b) and (c). Under the regulations, the agency proposing the action (the action agency) determines in the first instance whether a proposed action "may affect" a listed species. 50 C.F.R. 402.14. If the action agency determines that the proposed action "may affect" a listed species, it is then to enter into formal consultation with the FWS and/or NMFS (the wildlife agencies, see note 5, *supra*), unless the action agency has concluded through preparation of a biological assessment or informal consultation[6] that the action is not likely to adversely affect the listed species. *Ibid.* Following formal consultation, the wildlife agency issues a biological opinion stating whether the proposed action is likely to jeopardize the continued existence of the listed species. 16 U.S.C.

17.11, 402.01(b). The National Marine Fisheries Service (NMFS) administers the ESA with respect to the species under the jurisdiction of the Secretary of Commerce. See 50 C.F.R. 222.23(a), 227.4.

[6] Informal consultation is an optional process that includes all discussions between the action and wildlife agencies and that is "designed to assist the Federal agency in determining whether formal consultation * * * is required." 50 C.F.R. 402.13(a). If, as a result of the informal consultation process, the action and wildlife agencies mutually conclude that the contemplated action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated. 50 C.F.R. 402.13, 402.14(b).

1536(b); 50 C.F.R. 402.14. If the wildlife agency concludes that jeopardy is likely, it must suggest any reasonable and prudent alternatives that it believes would avoid jeopardy. 16 U.S.C. 1536(b)(3)(A). Section 7(d) of the ESA provides that, after the initiation of consultation, the action agency "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures." 16 U.S.C. 1536(d).

The FWS is the wildlife agency with jurisdiction over various non-marine listed species that are present in the vicinity of the Friant Unit. The Bureau began informal consultation (see note 6, *supra*) with the FWS in 1988 when Friant Unit contract renewal negotiations were underway, and commenced formal consultation with the FWS in May 1991. The FWS issued a "no jeopardy" biological opinion on October 15, 1991. By then, the Bureau had already executed ten Friant Unit renewal contracts. Pet. App. 21, 113-114.

NMFS is the wildlife agency with jurisdiction over listed anadromous fish species occurring in the Sacramento and San Joaquin river and estuary system. In August 1989, NMFS listed the Sacramento River winter-run chinook salmon as a threatened species, which listing was subsequently changed to endangered. Pet. App. 108 n.18. The Bureau determined that the renewal of the Friant Unit contracts would not adversely affect the winter-run chinook, and it requested NMFS's concurrence in that determination. See *id.* at 19, 127-128.

On November 1, 1991, NMFS advised the Bureau that it disagreed with the Bureau's "no adverse effect" conclusion. See Pet. App. 229. NMFS further advised

(see *id.* at 229-231), however, that formal consultation regarding the impact of the renewal of the Friant Unit contracts on the winter-run chinook salmon was unnecessary because the effects of the Friant Unit operations could be addressed in the context of a broader ongoing consultation process encompassing CVP operations generally.[7] On February 14, 1992, NMFS issued a biological opinion addressing the impacts of CVP operations in 1992. See *id.* at 215-228. The biological opinion concluded "that the proposed 1992 operation of the CVP by the Bureau is likely to jeopardize the continued existence of Sacramento River winter-run chinook salmon." *Id.* at 218-219. The opinion therefore identified "reasonable and prudent alternatives" by which, in NMFS's view, the 1992 CVP operations could

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[7] NMFS's November 1, 1991, letter stated in part (Pet. App. 229-230):

> While we disagree with the Bureau's determination that renewal of [the] Friant contracts are [*sic*] not likely to affect winter-run adversely, for the reasons discussed below, we do not believe a formal consultation on Friant contract renewals is necessary.
>
> While the Friant division of the [CVP] is remote from the winter-run chinook in the Sacramento River, the interrelated export of Sacramento River water through the Delta Mendota Canal does adversely affect the winter-run of chinook salmon. This diversion contributes to the entrainment of winter-run juveniles into the delta through the delta cross channel and other channels that lead to the Federal pumps at Tracy, California. * * * However, the issue of delta exports is being addressed in our ongoing consultation on the CVP (see the Bureau's request for consultation on the CVP, dated April 11, 1991) and we believe this will allow us to address the adverse impacts from activities interrelated to the renewal of the Friant contracts.

be modified to avoid jeopardizing the salmon. *Id.* at 219-228.

5. The Natural Resources Defense Council and others (collectively NRDC) initiated this litigation in December 1988. NRDC alleged that the Bureau intended to renew Friant Unit contracts without satisfying the requirements of Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C). Affected Friant Unit renewal contractors, including petitioners, intervened as defendants. See Pet. App. 12, 39-40. The district court denied NRDC's request for a preliminary injunction barring the Bureau from renewing the contracts, and the Bureau renewed the 14 contracts at issue here. *Id.* at 12.

NRDC subsequently amended its complaint to allege violations of ESA § 7(a)(2), 16 U.S.C. 1536(a)(2). NRDC further alleged that Section 8 of the Reclamation Act of 1902, 43 U.S.C. 372, 383, which generally requires the Bureau to comply with state laws relating to the control, appropriation, use, and distribution of water used in irrigation, see *California* v. *United States*, 438 U.S. 645 (1978), makes Section 5937 of the California Fish and Game Code (West 1998) applicable to the operations of the Friant Unit.[8] Section 5937 requires owners

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[8] Section 8 states:

> [N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from

of dams to allow sufficient water to pass to keep in good condition any fish that may be planted or exist below the dams.[9]

The Bureau and the Friant Unit renewal contractors moved to dismiss the Section 8/Section 5937 claim, asserting that Section 5937 falls outside of the ambit of Section 8 of the Reclamation Act. The district court denied that motion on April 30, 1992. *Natural Resources Defense Council* v. *Patterson*, 791 F. Supp. 1425 (E.D. Cal.). After the CVPIA was signed into law on October 30, 1992, the Bureau and the Friant contractors again moved for dismissal of the Section 8/Section 5937 claim. They asserted, *inter alia*, that CVPIA § 3406(c)(1), on its face, preempts any possible application of Section 5937 to the Friant Unit's opera-

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any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.

Act of June 17, 1902, ch. 1093, 32 Stat. 390 (codified at 43 U.S.C. 372, 383).

[9] Section 5937 provides:

The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam. During the minimum flow of water in any river or stream, permission may be granted by the department to the owner of any dam to allow sufficient water to pass through a culvert, waste gate, or over or around the dam, to keep in good condition any fish that may be planted or exist below the dam, when, in the judgment of the department, it is impracticable or detrimental to the owner to pass the water through the fishway.

tions. The district court rejected that argument and denied the motions to dismiss. See Pet. App. 38, 62-88.

The parties subsequently filed cross-motions for summary judgment on the NEPA and ESA issues. The district court ruled on those motions on May 31, 1995. See Pet. App. 89-137. The court found no NEPA violation. See *id.* at 92-107. The court concluded, however, that the Bureau's renewal of the relevant contracts violated the ESA because the Bureau had not adequately discharged its obligation to consult with the wildlife agencies regarding the effects of those renewals on listed species. See *id.* at 113-130.

With respect to the species falling within the jurisdiction of the FWS, the district court held that the Bureau had violated ESA § 7(a)(2), 16 U.S.C. 1536(a)(2), by renewing nine of the Friant Unit contracts before the date (October 15, 1991) when the FWS issued its "no jeopardy" biological opinion. Pet. App. 113-126.[10] The court likewise concluded (*id.* at 119-121) that the execution of those nine contracts during the pendency of consultation constituted an "irreversible or irretrievable commitment of resources" in violation of ESA § 7(d), 16 U.S.C. 1536(d). The court also held (Pet. App. 119-125) that the post-contracting completion of the

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[10] The Bureau had executed a total of ten Friant Unit renewal contracts at the time that the FWS issued its biological opinion. See p. 8, *supra*. As to one of those contracts, the Bureau had completed informal consultation with the FWS before the date of contract execution. Insofar as that contract was concerned, the district court found no violation of the ESA with respect to the species falling within the FWS's jurisdiction. Pet. App. 125-126. The court ordered that contract rescinded, however, on the ground that the Bureau had failed to pursue formal consultation with NMFS regarding the listed salmon species. *Id.* at 126-130; see p. 13, *infra*.

FWS consultation did not render the issue moot, since the court could enter effective relief by ordering rescission of the renewal contracts.

The district court also held (Pet. App. 128-130) that the Bureau had violated the ESA by failing to complete consultation with NMFS with respect to the winter-run chinook salmon. The court observed (*id.* at 128) that NMFS had refused to concur in the Bureau's determination that the contract renewals would not adversely affect the listed salmon species. In light of that non-concurrence, the court held, the Bureau could not properly rely on NMFS's contemporaneous statement that formal consultation on the contracts was unnecessary. *Id.* at 130. The court concluded that "[b]ecause all contracts at issue were executed without completed NMFS consultation, they are procedurally invalid." *Ibid.* In a subsequent order dated January 16, 1997, the district court (a) ordered rescission of all 14 renewal contracts on ESA grounds, and (b) held that the Section 8/Section 5937 claim was not ripe for decision and dismissed that claim. See *id.* at 13.

6. The Friant Unit renewal contractors appealed, challenging the district court's decision to set aside the renewal contracts on ESA grounds, as well as that court's resolution of the CVPIA facial preemption issue. NRDC appealed from the dismissal of its Section 8/Section 5937 claim and from the district court's NEPA ruling. The Bureau did not appeal. The court of appeals affirmed in part, reversed in part, and remanded for further proceedings. Pet. App. 1-37.

a. The court of appeals held (Pet. App. 18-21) that because NMFS had declined to concur in the Bureau's determination that the contract renewals were not likely to affect adversely the winter-run chinook, the Bureau had violated the ESA by renewing the con-

tracts without requesting a formal consultation. The court found that the Bureau had acted arbitrarily and capriciously in relying upon NMFS's view that formal consultation addressing the contract renewals was not required. The court explained:

> The Bureau had an affirmative duty to ensure that its actions did not jeopardize endangered species, and the NMFS letter clearly disagreed with the agency's determination of no adverse impact. Under those circumstances, regardless of the NMFS position that a formal consultation was "unnecessary," the Bureau had a clear legal obligation to at least request a formal consultation. The reason that the NMFS gave for stating that a consultation was unnecessary was not supported by statute or regulation and had no rational relationship to the Bureau's independent obligations to ensure that its proposed actions were not likely adversely to affect the salmon.

Id. at 20 (citations omitted).

b. The court of appeals next found (Pet. App. 21) that "the Bureau also failed to follow its obligations under [the ESA] with respect to its consultation with the FWS" by entering into nine renewal contracts prior to the issuance of the FWS biological opinion. The court upheld the district court's determination that the Bureau's execution of the contracts before the completion of the consultation process violated ESA § 7(d), 16 U.S.C. 1536(d). Pet. App. 22-23. The court of appeals held that NRDC's challenge to the premature execution of the renewal contracts was not rendered moot by the subsequent issuance of the FWS biological opinion finding that no jeopardy would result from the contract renewals, since the district court could enter

effective relief by ordering that those renewal contracts be rescinded. *Id.* at 23-25. The court further "conclude[d] that the district court's decision to rescind the contracts was not an abuse of discretion." *Id.* at 26.

The court ended its ESA analysis by discussing the particular situations presented by certain individual renewal contracts. The court found that the special circumstances concerning the various individual contracts did not serve to distinguish any one of them from the other contracts for ESA purposes. See Pet. App. 26-30. In light of its disposition of the ESA issues, the court held that it need not resolve NRDC's NEPA claim. See *id.* at 30-31.

c. The court of appeals held that the district court had erred in finding that the NRDC's Section 8/Section 5937 claim was not ripe for adjudication. Pet. App. 31-32. The court then concluded (*id.* at 33-34) that CVPIA § 3406(c)(1) does not, on its face, preempt the possible application of Section 5937 to the operations of the Friant Unit. The court found "no clear directive in the CVPIA which preempts the application of § 5937 if the state law could be implemented in a way that is consistent with Congress' plan to develop and restore fisheries below the Friant dam in a manner that is 'reasonable, prudent, and feasible.'" *Id.* at 33-34. The court concluded its discussion by stating (*ibid*):

> The district court, as the Bureau points out, never explicitly ruled that § 5937 applied to the Friant dam. There are several other issues that the district court did not address. For example, the district court did not determine whether § 5937 is applicable to the Friant dam under state law. It is preferable to determine whether the state law applies before reaching a determination that state

law has been preempted. The district court also did not reach the issue of whether the actual application of § 5937 is inconsistent with the CVPIA. It has yet to be determined how much water release would be required under § 5937 and whether that would be consistent with the CVPIA. We remand these issues to the district court for a determination on the merits.

ARGUMENT

The decision below satisfies none of the usual criteria that this Court applies in determining whether to exercise its certiorari jurisdiction. There is no conflict among the courts of appeals, the issues presented are unlikely to recur with any frequency, and the case is still in an interlocutory posture. The petitions for a writ of certiorari should be denied.

1. Petitioners seek review (Pet. 12-20; 98-1018 Pet. 16-30) of the question whether CVPIA § 3406(c)(1) facially preempts the possible application of Section 5937 of the California Fish and Game Code (West 1998), through Section 8 of the Reclamation Act, to the operations of the Friant Unit. At least in its current posture, that question does not warrant this Court's review.

This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari); see also, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case," making it "not yet ripe for review by this Court"). At present, the question whether Friant Unit operations are subject to Section 5937 of

the California Fish and Game Code is not ripe for resolution by this Court. The court of appeals rejected petitioners' contention that CVPIA § 3406(c) (1) on its face precludes the application of Section 5937 to the Friant Unit. Pet. App. 33-34. In remanding the case to the district court, however, the court of appeals left open the questions (a) whether Section 5937 applies to the Friant dam as a matter of California law, and (b) if so, whether application of that Section to the Friant Unit is inconsistent with the overall CVPIA scheme and therefore preempted. *Id.* at 34. If either of those issues is resolved favorably to petitioners, the question whether CVPIA § 3406(c)(1) on its face preempts the application of Section 5937 to the Friant Unit will be of no practical significance. Review by this Court would accordingly be premature.

2. Petitioners contend (see Pet. 20-22, 27-29) that the courts below erred in ordering rescission of nine of the Friant Unit renewal contracts on the ground that the contracts were executed before the FWS issued its biological opinion. Although we disagree with that aspect of the court of appeals' decision, we do not believe that the issue warrants review by this Court.

a. This Court has repeatedly emphasized that "[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982). Rather, "the bases for injunctive relief are irreparable injury and inadequacy of legal remedies. In each case, a court must balance the competing claims of injury and must consider the effect on each party of the granting or

withholding of the requested relief." *Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531, 542 (1987).

Well before the district court rendered its decision in this case, the FWS issued a biological opinion stating that renewal of the pertinent contracts would not jeopardize the continued existence of species falling within that agency's jurisdiction. Neither of the courts below cast doubt upon the adequacy of that biological opinion. Absent any showing that renewal of the contracts would result in harm to listed species, the rescission remedy ordered by the district court and affirmed by the court of appeals was inappropriate. Compare *Village of Gambell*, 480 U.S. at 544 (vacating grant of injunctive relief and noting that the court of appeals "erroneously focused on the statutory procedure rather than on the underlying substantive policy the process was designed to effect").

We do not believe, however, that this aspect of the court of appeals' decision warrants further review. Although the district court ordered rescission of the contracts previously executed between petitioners and the Bureau, it did not enjoin the parties from executing new contracts for Friant Unit water. The Department of the Interior informs us that the Friant contractors whose 40-year renewal contracts were rescinded in this litigation are currently receiving water under interim contracts issued pursuant to CVPIA § 3404(c)(1), as are the additional 14 Friant contractors whose contracts were not renewed prior to the passage of the CVPIA. Nor, contrary to petitioners' contention (see Pet. 28), did the court of appeals announce a per se rule mandating the rescission of a contract or lease whenever the relevant federal agency fails to comply in a timely fashion with applicable procedural requirements. The court held only that under the circumstances of this

case, "the district court's decision to rescind the contracts was not an abuse of discretion." Pet. App. 26. Particularly in light of the limited practical impact of the rescission remedy in the circumstances of this case, that fact-specific holding does not warrant this Court's review.[11]

b. Petitioners also contend (Pet. 20-23) that the issuance of the FWS biological opinion rendered NRDC's ESA claim moot. In our view, the mootness inquiry is essentially derivative of the remedial issue discussed above. If rescission of the pertinent contracts was inappropriate, then completion of the consultation process did effectively render moot any controversy as to the propriety of the pre-completion execution of those contracts. If (as the courts below held) rescission remained an appropriate remedy even after the FWS biological opinion was issued, then issuance of that opinion could not be thought to have rendered the question moot. In either event, petitioners' mootness argument adds nothing of substance to their contention that the district court improperly ordered the contracts rescinded.[12]

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[11] NRDC asserted, as a separate ESA claim, that the biological opinion issued by the FWS in 1991 was inadequate. The courts below found it unnecessary to address that issue in light of their determination that rescission of the contracts was an appropriate remedy for the untimeliness of the FWS consultation. See Pet. App. 25 n.8, 132. As we explain above, we disagree with that determination. We note, however, that if this Court were to grant the petition for a writ of certiorari and reverse that holding, the result would not be to terminate the controversy regarding the FWS consultation process. Rather, such a decision would likely lead to further litigation concerning the adequacy of the 1991 biological opinion.

[12] Contrary to petitioners' contention (Pet. 21-22), the court of appeals' decision in this case does not conflict with the decisions in

3. Petitioners contend (Pet. 23-24) that the courts below erred in ordering rescission of all 14 of the Friant Unit renewal contracts on the additional ground that the Bureau breached its ESA obligations with respect to the winter-run chinook salmon. We agree that the Ninth Circuit's analysis on that point was also mistaken, but we do not believe that the error warrants this Court's review.

Section 7(a)(2) of the ESA requires that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary [of Commerce or the Interior], insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2). That provision does not, however, speak to the *manner* in which ESA consultation must be conducted. In particular, Section 7(a)(2) does not suggest that the action and wildlife agencies are required to engage in a

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Southern Utah Wilderness Alliance v. *Smith*, 110 F.3d 724, 727-729 (10th Cir. 1997), and *Sierra Club* v. *Glickman*, 156 F.3d 606, 618-620 (5th Cir. 1998). In each of those cases, the only relief sought for the alleged procedural violation was an order directing the relevant federal agency to engage in consultation with the FWS. Under those circumstances, the Fifth and Tenth Circuits held that completion of the consultation processes rendered the controversies moot, since after consultation was completed the courts lacked the ability to award meaningful relief. See *Sierra Club*, 156 F.3d at 619 (issue was moot since "there is no relief that can be obtained from this court"); *Southern Utah*, 110 F.3d at 728 (plaintiff "does not explain how an injunction ordering another round of consultation would provide any meaningful relief"). Those decisions have no bearing on the instant case, where the court of appeals' resolution of the mootness issue was expressly based on its determination that an additional remedy (rescission of the contracts) remained available.

separate consultation process for each discrete agency "action." Rather, insofar as Section 7(a)(2) may be said to impose a "procedural" obligation on federal action agencies, that obligation is simply to engage in consultation at such time and in such manner as is necessary to "insure" that the agency's activities are not likely to jeopardize the continued existence of any listed species. Cf. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978) ("this Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments").

In the instant case, NMFS concluded that consultation specifically directed to the Friant Unit contracts was unnecessary because any indirect adverse effects of Friant Unit contract renewals on the listed salmon could adequately be addressed in a larger ongoing consultation on the CVP as a whole. Pet. App. 230; see note 7, *supra*. In our view, that determination was well within NMFS's considerable range of discretion. In light of that determination by the wildlife agency having jurisdiction over the listed salmon species, the Bureau did not behave arbitrarily in declining to make further efforts to initiate formal consultation with respect to the contracts themselves.[13]

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[13] For the foregoing reasons, we believe that NMFS and the Bureau could permissibly agree to consider the effects of Friant Unit operations on the listed salmon within the context of the overall CVP operations, rather than in a separate consultation directed at the Friant contracts themselves. Petitioners suggest (Pet. 9, 20) that a biological opinion issued by NMFS on February 14, 1992 (Pet. App. 215-228) adequately addressed the effects on the salmon of the pertinent Friant renewal contracts. That opinion

We do not believe, however, that the court of appeals' contrary ruling warrants review by this Court. The court of appeals did not purport to issue any broad pronouncement concerning the nature of the procedural obligations imposed by the ESA. Nor does the court's holding conflict with any decision issued by this Court or by another court of appeals. Further review of this fact-specific question is not warranted.

4. Petitioners contend (Pet. 25-27) that the court of appeals erred in applying ESA § 7(d) to the Bureau's consultation with FWS. Section 7(d) provides that, after the initiation of consultation between the action and wildlife agencies, the action agency "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures." 16 U.S.C. 1536(d). Petitioners assert that the restrictions of Section 7(d) apply only after the initiation of consultation (Pet. 25-26); that, under the applicable regulations, "consultation begins when an agency requests a list of species that may be present in the proposed action area" (Pet. 26); and that "consultation in this case, for purposes of Section 7(d), began on April 13, 1988, not May 22, 1991, as the Ninth Circuit concluded" (Pet. 27).

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stated, however, that "NMFS and the Bureau agreed that this initial consultation would include only CVP operations in 1992, but consultation would continue on the long-term impacts, and a new opinion would be issued for future operations." *Id.* at 217. We are informed by the Department of the Interior that on February 12, 1993, NMFS issued a biological opinion that addressed the Bureau's long-term operation of the CVP. Neither of the courts below addressed that biological opinion.

The court of appeals, however, did not hold that the "consultation" commenced for ESA § 7(d) purposes on May 22, 1991—it merely observed (correctly) that "[f]ormal consultation was requested on May 22, 1991." Pet. App. 21. In any event, petitioners do not explain how an *earlier* "initiation of consultation" date could work to their advantage here. Indeed, petitioners maintain (Pet. 26) that Section 7(d) "imposes restrictions on agency action that do not exist before the initiation of consultation."[14] If, as petitioners maintain, the Bureau's ability to act became more restricted once consultation with FWS had been initiated, then an earlier "initiation of consultation" date could not possibly change any aspect of this litigation to petitioners' advantage. Accordingly, the ESA § 7(d) question does not warrant review by this Court.[15]

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[14] The initial Friant Unit renewal contract was executed in May 1989, after consultation had been initiated by the Bureau's request to FWS for a species list. See Pet. App. 26-29, 113. Hence, this case does not concern what effects, if any, ESA § 7(d) may have with respect to agency commitments of resources undertaken prior to the initiation of consultation.

[15] Petitioners in No. 98-1018 raise a variety of claims unique to the circumstances of petitioners Chowchilla Water District and Madera Water District. See 98-1018 Pet. 30-38. Those claims raise no issues of general importance warranting this Court's review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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No. 98-1018

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1998

CHOWCHILLA WATER DISTRICT AND
MADERA IRRIGATION DISTRICT

Petitioners

vs,

NATURAL RESOURCES DEFENSE
COUNCIL, ET AL.

Respondents

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

REPLY TO BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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I.
INTRODUCTION

It is a strange feeling to have the Federal Government, who for eight years of litigation in the District Court vigorously supported the arguments presented to this Court by the Non-Federal Defendants, suddenly change their position during appeal and take the position that Certiorari should be denied even though they disagree with the conclusions of the Circuit Court.

This is especially disturbing when the very structure of the Friant Unit of the Central Valley Project is at stake. Hundred of thousands of acres of the most productive farm lands in the nation are subject to having their essential water supplies reduced to a point that the lands may become barren.

For over fifty years all of the flows of the San Joaquin River, other than flood flows and releases to meet riparian rights between Friant Dam and Gravelly Ford, have been diverted at Friant Dam to meet the contractual requirements of the Non-Federal Defendants. Except for occasional spring flood releases, the river has been dry between Gravelly Ford and Mendota Pool. This has been done with the consistent knowledge of Congress.

NRDC now attempts to change the project operation by requiring releases from Friant Dam under California Fish & Game Code § 5937 to re-establish a Salmon run which has been non-existent for over fifty years. The cost will be to take a major portion of the firm yield of the project away from the contractors in the Friant Division to accomplish NRDC's stated purpose.

II.
FACIAL PREEMPTION OF SECTION 5937 BY THE CVPIA

The Circuit Court held that there was "no clear directive in the CVPIA which preempts the application of § 5937 if the State law could be implemented in a way that is consistent with, Congress' plan to develop and restore fisheries in a manner that is 'reasonable prudent, and feasible.'" (Emphasis added)

By this statement, the Circuit Court acknowledges that the plan must come from Congress, not the State.

If Congress develops a plan to restore fisheries that is "reasonable prudent, and feasible," it will direct the Secretary to comply with the plan adopted by Congress, and to release water from Friant Dam pursuant thereto.

On the other hand, if Congress determines that there can be no plan to restore fisheries which meets the requirements of "reasonable prudent, and feasible," it will do nothing. The Secretary must then comply with the CVPIA and make no releases from Friant, as Congress has directed.

In any event, it is Congress, not the State under § 5937, who must make the determination whether or not to require releases.

III.
REMAND IS NOT NECESSARY

Federal Defendants assert that the case should be remanded to the district court to determine "whether the

application of that section (§ 5937) to the Friant Unit is inconsistent with the overall CVPIA scheme and is therefore preempted."

This Court in *California v. United States,*438 U.S. 645,674-5, this Court held that Section 8 of the Reclamation Act subjected distribution of reclamation water to state law unless that law is inconsistent with congressional directives.

The Ninth Circuit elaborated in *U.S. v. State of Cal. State Water Resources,* 694 F.2d 1171,1176:

> **". . . a statute or regulation is preempted by a federal rule 'to the extent it conflicts with a federal statute,' or where it 'stands as an obstacle to the full accomplishment and execution of the full purposes and objectives of Congress.'" (Emphasis added)**
>
> **"[A] state limitation or condition on the federal management or control of a federally financed water project is valid unless it clashes with express or clearly implied congressional intent or works at cross-purposes with an important federal interest served by the congressional scheme." Id. (Emphasis added)**

Where do we look to determine the "important federal interest served by the congressional scheme?" Obviously to congressional intent as manifested by Congress' actions over the past fifty years and its current intent as manifested by the directive to the Secretary in the CVPIA.

Prior congressional intent was set forth by this Court in *United States v. Gerlach Live Stock Company* 339 U.S. 725, 94 L Ed 1231 (1950), *Ivanhoe Irrigation District v. McCracken,* 357 US 275, 78 S Ct 1174, 2 L Ed 2d 1313 (1950) an *Dugan v. Rank,* 372 US 609, 83 S Ct 999, 10 L Ed 2d 15, (1963) all extensively set forth in our opening Petition. Each of these cases set forth that congressional intent was that the river remain dry.

The current congressional scheme is abundantly clear in the CVPIA directive to the Secretary not to release water from Friant Dam for fish restoration without an act of Congress.

In *Dugan v. Rank,* 372 US 609, 83 S Ct. 999, 10 L Ed 2d 15, (1963) the district court had ordered the United States to construct ten collapsible dams between Friant Dam and Gravelly Ford to raise the river to its former height. This court stated at 372 US 620-21:

> "As the Court of Appeals found, the Project 'could not operate without impairing, to some degree, the full natural flow of the river.' Experience of over a decade along the stretch of the San Joaquin involved here indicates clearly that the impairment was most substantial--almost three-fourths of the natural flow of the river. To require the full natural flow of the river to go through the dam would force the abandonment of this portion of a project which has not only been fully authorized by Congress but paid for through its continuing appropriations. Moreover, it would prevent the fulfillment of the contracts made by the United States with the Water and Utility Districts which are petitioning in No. 115. The Government would, indeed, be 'stopped in its tracks' . . . (Emphasis added)

> Government would, indeed, be 'stopped in its tracks' . . . (Emphasis added)
>
> "Moreover, the decree would require the United States--contrary to the mandate of Congress--to dispose of valuable irrigation water and deprive it of the full use and control of its reclamation facilities." (Emphasis added)

Like the ten collapsible dams ordered by the district court in *Dugan*, a State mandated release of water under § 5937 to re-establish a salmon run would "prevent the fulfillment of the contracts made by the United States with the Water and Utility Districts which are petitioning in No. 115. The Government would, indeed, be "stopped in its tracks."

What more is needed? This Court can put to rest the threat to the CVP and the contracting districts that the water supplies will be drastically cut to re-water a river that has been dry for over fifty years. Facial preemption of § 5937 under the directives of the CVPIA is clear. This Court is the final body to determine congressional intent. It should do so now.

IV.
THE RIGHTS OF CHOWCHILLA AND MADERA

The Federal Respondents do not address the substantive issues raised by Chowchilla and Madera. Instead, by a footnote they state that "those claims raise no issues of general importance warranting this Court's review."

To the contrary, the issue of "surrender of sovereign rights in unmistakable terms" abrogated in *United States v. Winstar* Corp. 116 S Ct 2432, 135 L. Ed.2nd 964 should be put to rest. Further, when a vested right has accrued prior to the adoption of ESA, Section 7 consultation is not a prerequisite to fulfilling that right. There is a conflict between the decision in this case and *Marbled Murrelet v. Babbit,* 83 F3d 1068, and *Sierra Club v. Babbitt,* 65 F3d 1502.

V.
CONCLUSION

Regardless of the importance of these claims, the § 5937 issue is vital to the continued operation of the largest Reclamation Project of all time. Certiorari should be granted.

Respectfully submitted,

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By: _____
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Supreme Court, U.S.
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CLERK

Nos. 98-926 and 98-1018

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

LOWER TULE RIVER IRRIGATION DISTRICT, *et al.*,
Petitioners,
v.
NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,
Respondents.

CHOWCHILLA WATER DISTRICT and
MADERA IRRIGATION DISTRICT,
Petitioners,
v.
NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether section 3406(c)(1) of the Central Valley Project Improvement Act, a federal environmental law that prohibits certain Friant Dam flow releases "as a measure to implement *this title*," facially preempts California Fish and Game Code § 5937, a pre-existing state law that requires flow releases to protect downstream fisheries.

2. Whether the Bureau of Reclamation was excused from a statutory requirement that the Bureau either consult formally with the National Marine Fisheries Service on certain water contract renewals or obtain the Service's concurrence that the renewals were unlikely to affect a protected species adversely, where the Service *refused* to give the Bureau its concurrence but stated that consultation was unnecessary at that time due to a separate ongoing consultation, which itself did not consider the renewals.

3. Whether Respondents' action to rescind certain water supply contracts, which the Bureau of Reclamation renewed before completing mandatory formal consultation with the Fish and Wildlife Service, was "mooted" by the Bureau's *ex post facto* consultation, even though the contracts continued to injure the Respondents until rescinded.

STATEMENT PURSUANT TO RULE 29.6

Respondents have no parent or nonwholly owned subsidiary companies.

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CHOWCHILLA WATER DISTRICT and
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NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT

Respondents are conservation organizations and recreational and commercial fishing groups whose members experience "economic and recreational damage * * * occasioned by the drying up of the San Joaquin River below the Friant Dam."[1] In 1989, Respondents sued the Bureau

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[1] *See Natural Resources Defense Council v. Patterson*, 791 F. Supp. 1425, 1429 (E.D. Cal. 1992). Respondents are Natural Re-

of Reclamation ("Bureau") and the Secretary of the Interior (collectively, "the Government") to challenge several long-term water supply renewal contracts about to be executed by the Bureau, and petitioner irrigation districts and water user authority ("Petitioners") intervened. When the district court invalidated the contracts as violative of the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, and implementing regulations, Petitioners (but not the Government) appealed. The Court of Appeals unanimously rejected Petitioners' arguments (Pet. App. 1, 36),[2] and Petitioners sought this Court's review. The Government joins in some of Petitioners' merits arguments—an unsurprising position given that the Government was a defendant below, and lost—but agrees with Respondents that review by this Court is not warranted.[3]

Petitioners' Statement (Pet. 3-12) obscures or ignores several significant facts:

First, Petitioners' argument that the Bureau need not consult with the National Marine Fisheries Service (NMFS) about the Friant renewal contracts rests on the assertion that the Bureau did formally consult with

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sources Defense Council; Trout Unlimited of California; Bay Institute of San Francisco; California Natural Resources Federation; California Sportfishing Protection Alliance; California Trout; Friends of the River; Northern California Guides Association; Pacific Coast Federation of Fishermen's Associations; San Joaquin Raptor Rescue Center; Sierra Club; Stanislaus Audubon Society, Inc.; United Anglers of California; California Striped Bass Association; and National Audubon Society.

[2] Unless otherwise noted, references to "Pet. App.," "Pet.," "Reply," or "Petitioners" are to the Petition Appendix, Petition, Reply, and Petitioners in No. 98-926. The Petition in No. 98-1018 is addressed at note 15, *infra*.

[3] The Government does not join Petitioners' merits argument on preemption (Gov't Opp. 16-17) and disagrees with Petitioners on mootness (Gov't Opp. 19 & n.12).

NMFS on overall Central Valley Project ("CVP") operations in 1992. Pet. 8, 9, 24. However, the Bureau's 1992 consultation with NMFS *specifically excluded any consideration* of either the Friant renewal contracts or the direct impacts of Friant Dam operations and diversions. Pet. App. 216.

Second, Petitioners assert that the NMFS's 1992 "reasonable and prudent alternative" for CVP operations called for no changes in Friant operations or renewal contracts. Pet. 9. But the NMFS's 1992 biological opinion did not even consider whether to recommend changes to Friant operations or renewal contracts as part of an alternative to prevent jeopardy to the protected chinook salmon. Pet. App. 216, 219. Instead, NMFS developed its "reasonable and prudent alternative" through a consultation process that excluded consideration of the contracts.

Third, Petitioners' Statement ignores that, after the district court invalidated the renewal contracts, Petitioners and the Bureau executed interim replacement contracts under the CVPIA that are more protective of Respondents' environmental and other interests. New long-term replacement contracts will likely also be more protective of Respondents' interests, because the long-term replacement contracts must comply with Central Valley Project Improvement Act (CVPIA) requirements, *see, e.g.*, CVPIA §§ 3404(c), 3405 (Pet. App. 167-177), and be negotiated in light of extensive environmental reviews.

Fourth, contrary to Petitioners' implication (Pet. 4; Reply 4; No. 98-1018 Pet. 12), this litigation has never prevented Petitioners from receiving water from the Friant Unit. Gov't Opp. 18. Petitioners' assertion that the contract rescissions have significantly impacted Central Valley agriculture is wholly unsupported by the record.[4]

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[4] In addition, Petitioners' implication (Pet. 11) that Respondents never challenged the Fish and Wildlife Service ("FWS") biological

ARGUMENT

This case satisfies none of the usual criteria for granting a writ of certiorari. The questions presented are unlikely to arise often, there is no conflict among the circuits, and the decision below was correct.

1. *The Preemption Question.* Petitioners first ask this Court to construe a federal statutory provision that applies to just one dam in the country. The extreme narrowness of that question militates against granting review. Review is especially inappropriate because the courts below have not yet resolved whether the allegedly preempted state statute even *applies* to that dam under state law. Moreover, the decision below was a plainly correct application of this Court's precedent to plain statutory language, and neither the Federal government nor the State of California seeks review.

The allegedly preemptive provision of federal law is found in the Central Valley Project Improvement Act, Pub. L. No. 102-575, Title XXXIV, 106 Stat. 4706, which generally directed the Secretary of the Interior to "develop and implement a program" to sustain production of anadromous fish (such as the chinook salmon) in Central Valley rivers at twice the species' average 1967-1991 level. CVPIA § 3406(b)(1) (Pet. App. 178). However, because Congress was unsure what program should be implemented for the particular stretch of the San Joaquin River below Friant Dam, Congress deferred that question, and instead instructed the Secretary of the

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opinion is false. As explained by the Government (Gov't Opp. 19 n.11), Respondents *have* challenged the validity of the FWS biological opinion, under both the Endangered Species Act and the Administrative Procedure Act. Respondents' substantive challenge to that FWS opinion was dismissed without prejudice *only* because Respondents' other victories "offered complete relief." Pet. App. 25 n.8.

Interior to develop a plan to improve San Joaquin streamflow, riparian habitat, and water quality. CVPIA § 3406 (c)(1) (Pet. App. 191). Congress emphasized, however, that it was not yet directing the Secretary to implement any new flow-release program for that stretch, for Congress restricted the Secretary's authority to release water from the Friant Dam "*as a measure to implement this title.*" *Id.* (Pet. App. 192) (emphasis added).

In *California v. United States*, 438 U.S. 645 (1978), this Court held that, under Reclamation Act § 8, California "may impose *any* condition on the 'control, appropriation, use or distribution of water' through a federal reclamation project that is not inconsistent with clear congressional directives." *Id.* at 672 (emphasis added).[5] While CVPIA § 3406(c)(1) required the Secretary to develop a San Joaquin River restoration plan, nothing in that section's language even hinted that Congress intended to suspend the Secretary's existing legal responsibilities, particularly the Secretary's existing duties to comply with state water law. The modifying clause "as a measure to implement this title" plainly limited the surrounding text —i.e., it limited the Secretary's authority to release water from the Friant Dam to implement the CVPIA—and would have been mere surplusage if, as Petitioners con-

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[5] Section 8 of the Reclamation Act, 43 U.S.C. § 383, provides that "[n]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws." Petitioners concede that "purposeful and continued deference to State water law by Congress" permeates "the federal-state relationship concerning water usage." Pet. 13 (internal quote marks omitted).

tend, Congress had intended flatly to prohibit *all* release of water from Friant Dam, no matter what the statutory basis.[6]

The allegedly preempted provision of California law, Fish and Game Code § 5937, requires dam owners to "allow sufficient water" to be released from a dam "to keep in good condition any fish" downstream. Section 5937 is not a "measure to implement" the CVPIA. Indeed, section 5937 predated the CVPIA. On its face, the CVPIA does not preempt section 5937 or any other state law. If section 5937 applied to the Friant Dam before the CVPIA's enactment—a question that the court of appeals remanded to the district court to resolve in the first instance[7]—then section 5937 continued to apply

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[6] Disregarding the "duty to give effect, if possible, to every clause and word of a statute," *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (internal quote marks omitted), Petitioners never suggest a meaning for the phrase "as a measure to implement this title." Petitioners suggest only that the key phrase should be construed in light of the CVPIA's "broad" purposes. Pet. 17-18. However, there is no facial conflict between the CVPIA's purposes —e.g., "to protect, restore, and enhance fish, wildlife, and associated habitats in the Central Valley," *see* CVPIA § 3402(a) (Pet. App. 162)—and California Fish and Game Code § 5937, which requires dam owners to allow sufficient water to flow over, around, or through a dam or fishway "to keep in good condition any fish that may be planted or exist below the dam."

[7] As the Government notes (Gov't Opp. 16-17), the courts below did not resolve whether § 5937 applied to the Friant Dam as a matter of state law, or if it did, whether that section would in practice interfere with CVPIA § 3406(c)(1) (Pet. App. 34). These unresolved issues counsel against review. In reply, Petitioners (Reply 8) cite several cases—*Abbott Lab. v. Gardner*, 387 U.S. 136 (1967); *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, (1985); and *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Devel. Comm'n ("PG&E")*, 461 U.S. 190 (1983)—in which this Court decided to review issues that had a "direct and immediate" impact, 387 U.S. at 152, or had "plagued" industry and "seriously hampered" implementation of federal law, 473 U.S. at

after the CVPIA's enactment.[8]

2. *The NMFS Consultation Question.* Petitioners contend (Pet. 23-24) that the courts below should have excused the Bureau from its ESA consultation obligations, despite NMFS's disagreement with the Bureau over whether the Friant renewal contracts were likely to affect chinook salmon adversely. Pet. App. 229. However, Petitioners have not suggested any split among the circuits, have not shown that the issue presented is likely to arise often, and have offered no other good reason for review.

As for the merits, the Bureau squarely violated the ESA and implementing regulations when it renewed the Friant contracts without completing formal NMFS consultation. Section 7(a)(2) of the ESA requires "[e]ach Federal agency" to consult with the NMFS or FWS to "insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2). The implementing regulations require each federal agency to engage in "formal consultation" if "a determination is made" that "any action may affect listed species." 50 C.F.R. § 402.14(a). Formal consultation is excused *only* if "the Federal agency determines, *with the written concurrence of [NMFS or FWS]*, that the proposed action is not likely

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581, or required prompt resolution to prevent a "palpable and considerable hardship, 461 U.S. at 201-02. The present case is clearly different, as the Court here cannot know whether § 5937 will ever be applied adversely to Petitioners. *Cf. PG&E*, 461 U.S. at 203.

[8] Unable to offer any alternative explanation for the phrase "as a measure to implement this title," Petitioners argue that "[t]he legislative history of the CVPIA * * * strongly supports an interpretation that Congress intended the Act to preempt state law relating to the release of water from Friant Dam." Pet. 19. Petitioners' legislative history argument was carefully considered—and rejected—by the district court. Pet. App. 75 n.17, 77-82.

to adversely affect any listed species" (or in one other circumstance not at issue). 50 C.F.R. § 402.14(b) (emphasis added).[9] Here, of course, NMFS did not give the Bureau its "written concurrence," but rather *disagreed* with the Bureau's view that the Friant contracts were unlikely to impact winter-run chinook salmon adversely. Formal consultation was required.

Thus, the court of appeals was correct that NMFS's statement to the Bureau that consultation on the contract renewals was "not * * * necessary" at that time (Pet. App. 229, 231) did not excuse the Bureau's consultation obligation. NMFS premised its statement on the fact that the Bureau and NMFS were separately consulting on proposed overall CVP operations. Pet. App. 230. But the Bureau's consultation on the proposed overall CVP operations specifically excluded consideration of the renewal contracts (the agency action at issue here) or any direct consideration of Friant operations. Pet. App. 216. The Bureau's general CVP consultation therefore could not have satisfied the Bureau's obligation to consult formally on the Friant contracts.

Moreover, NMFS ultimately concluded that the proposed overall CVP operations were "*likely to jeopardize* the continued existence" of the winter-run chinook salmon. Pet. App. 218-19 (emphasis added). While NMFS offered the Bureau one alternative that could "be implemented by the Bureau to avoid jeopardy" (Pet. App. 219), neither NMFS nor the Bureau considered whether releases from Friant Dam (or any other changes at Friant

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[9] Similarly, the legislative history of ESA § 7 shows Congress' intent that "[i]f the Federal action agency or the Secretary determines that a proposed action may affect a listed species or its habitat, immediate consultation shall be undertaken." H.R. Rep. No. 1625, 95th Cong., 2d Sess. 20 (Sept. 25, 1978), *reprinted in* 1978 U.S.C.C.A.N. 9470

or in the renewal contracts) should be pursued to avoid jeopardy. Pet. App. 216, 219. Of course, by the time NMFS issued its 1992 Biological Opinion, the Bureau already had renewed numerous Friant water supply contracts. The Bureau's renewal of those contracts prior to completing any formal consultation with NMFS on CVP operations violated ESA § 7(d), which specifically prohibits federal agencies from "mak[ing] *any* irreversible or irretrievable commitment of resources" that "has the effect of foreclosing the formulation or implementation of *any* reasonable and prudent alternative" until consultations are completed. 16 U.S.C. § 1536(d) (emphasis added).

Petitioners' argument rests on the false premise that "the Secretary of Commerce refuse[d] to consult" with the Bureau (Pet. i), and upon Petitioners' contention, based on that false premise, that the Bureau would have to "sue its sister agency" to persuade NMFS to consult (Pet. 23). But the Bureau never asked NMFS to engage in formal consultations on the Friant contracts. Thus, despite Petitioners' oft-repeated assertions (Pet. i, 10, 23), NMFS never "refused" to consult. Rather, the Bureau asked NMFS to concur that the Friant renewal contracts "will not affect" the chinook salmon, and NMFS *declined to concur* in that view. Pet. App. 229. NMFS also offered its advice that formal consultation was "not * * * necessary," but did not refuse to consult. In any event, as the Government itself agrees (Gov't Opp. 22), the unique factual dispute as to whether the NMFS "refused" to consult does not merit this Court's review.[10]

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[10] Petitioners also discuss an ESA § 7(d) issue (Pet. 25-27) that is not among the Petitioner's "Questions Presented." *See* Pet. i; *see also* Reply 1. Under this Court's Rule 14.1(a), "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." While the court of appeals' application of ESA § 7(d) may be "*related* to * * * and perhaps *complementary* to" the "Questions" as to which a writ of certiorari is sought, the

3. *The "Mootness" Question.* Petitioners contend that because consultation with the FWS on the Friant renewal contracts eventually occurred—albeit *after* the contracts were a *fait accompli*—Respondents' claim that the Bureau thereby violated the ESA is moot. Even if Petitioners were right, that issue would not merit review because the courts below had a separate and adequate basis for the relief ordered, and thus resolution of the FWS issue cannot affect the relief ordered. But Petitioners are not right: The court of appeals' decision as to FWS consultation was consistent with the decisions of other circuits and correctly applied the decisions of this Court.

First, the court of appeals (Pet. App. 21a, 23) affirmed the district court's invalidation of the Friant renewal contracts on two distinct grounds: (1) the Bureau's failure to consult in advance with the FWS and (2) the Bureau's failure *ever* to consult with NMFS. Because the mootness question arises, if at all, only as to Respondents' FWS consultation claim (Pet. i), the contracts would remain rescinded even if that claim somehow were moot (which it is not).[11]

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challenged application of ESA § 7(d) is "not 'fairly included'" in those "Questions." *Yee v. City of Escondido*, 503 U.S. 519, 537 (1992) (emphasis in original). Even if it were—and even if, as the Petitioners contend, the court of appeals mistook the date on which ESA § 7(d) began to apply (something Respondents do not concede)—such a factual error would not warrant this Court's scrutiny. *See* Supreme Court Rule 10. And as the Government notes (Gov't Opp. 23), Petitioners cannot possibly benefit from their position that ESA § 7(d) should have applied for a *longer* period.

[11] The Petitioner's NMFS consultation issue is whether formal consultation was required *at all* on the renewal contracts, not whether that consultation belatedly occurred. Petitioners do not argue that the disagreement over NMFS consultation is moot, nor could they, since formal consultation with NMFS on the Friant contracts never took place. The Bureau's 1992 consultation with NMFS concerning overall CVP operations specifically excluded any consideration of the Friant renewal contracts.

Second, the decision below is consistent with those of other circuits. In *Southern Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997) ("*SUWA*"), ESA consultation was "the only relief sought by" the plaintiff. Thus, the *SUWA* plaintiff's sole prayer for relief was satisfied once the *SUWA* defendants completed ESA consultation; there was "no point in ordering an action that has already taken place." *Id.* at 728. Here, by contrast, rescission relief was sought and attained only by order of the district court, and *SUWA* certainly does not preclude such relief, since the *SUWA* court made clear that its holding was "*not* * * * that a violation of section 7(a)(2) could always be cured by subsequent consultation." 110 F.3d at 729 (emphasis added).

In *Sierra Club v. Glickman*, 156 F.3d 606, 611 (5th Cir. 1998), the district court ordered the United States Department of Agriculture ("USDA") to consult with the FWS concerning a particular program. While USDA's appeal was pending, USDA completed ESA consultations and fully satisfied the district court's order. *Id.* The court of appeals then held that USDA's *appeal* was moot, because "the USDA clearly fulfilled whatever obligations it had as a result of the district court's order" and could obtain no relief from the appellate court. *Id.* at 619.

The present controversy simply is not like *SUWA* and *Glickman*. Respondents seek a remedy—rescission of the unlawful contracts—that was not performed until the court ordered it and that benefitted them by replacing all fourteen renewal contracts with more environmentally protective contracts under the CVPIA. The Government is thus correct that *SUWA* and *Glickman* "have no bearing on the instant case." Gov't Opp. 19 n.12.[12]

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[12] The "mootness" question in this case is wholy dissimilar from that in *Friends of the Earth v. Laidlaw Environmental Services*

Third, the decisions below correctly applied established mootness principles. Rescission of the unlawful contracts redressed Respondents' injuries by, *inter alia*, requiring the Bureau to renegotiate the contracts in light of environmental reviews and CVPIA requirements. Congress presumably believed that requiring federal agencies to complete ESA consultations before irrevocably committing resources would beneficially influence agency decisionmaking. *See* ESA § 7(d), 16 U.S.C. § 1536(d). Petitioners in fact concede that "the new contracts may contain substantially different provisions than the rescinded contracts" and that "there is no guarantee that Petitioners would receive the same amount of water under the same terms as they did under the previous contracts." Reply 4. As Petitioners' concession suggsets, neither the courts below nor any of the parties to this case have ever suggested that contract renegotiation would lead to contracts unchanged from the original.[13]

(TOC) Inc., 149 F.3d 303 (4th Cir. 1998), *petition for cert. granted*, No. 98-822 (Mar. 1, 1999). The narrow mootness issue posed by *Laidlaw* is whether, and under what circumstances, a private person who sues to enforce the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, has a cognizable interest in civil penalties payable to the Treasury, if the defendant halts its illegal pollution after the complaint is filed. 149 F.3d at 306-07. Here, by contrast, Petitioners do not presently dispute that Respondents suffer a continuing injury from the diversion of San Joaquin River water. Contract rescission redresses that injury sufficiently to satisfy the case-or-controversy requirement.

[13] The Petition contends that the court of appeals "erred in ruling that rescission * * * was the sole available remedy." Pet. 27-29. This issue, like the ESA § 7(d) issue, *see* note 10, *supra*, is not among the Petition's "Questions Presented." Pet. i; *see also* Reply 1. While the court of appeals' review of the district court's remedy may be "*related* to * * * and perhaps *complementary* to" the "Questions" as to which a writ of certiorari is sought, it is "not 'fairly included' " in the "Questions Presented." *Yee*, 503 U.S. at 537.

In any event, Petitioners' argument that the court of appeals required rescission "*automatically in all cases*" (Pet. 28; emphasis

Of course, Article III does not require Respondents to show that rescission will *necessarily* benefit them: A "person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting the normal standards for redressability and immediacy." [14] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992). Indeed, "one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years."

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in original) ignores that court's holding. As the Government observes, the court of appeals did not "announce a per se rule." Gov't Opp. 18. Rather, it stated that the district court "had *discretion* to preserve the contracts if the procedural flaw could have been rectified in another way," but that "there is no reason to compel that result here." Pet. App. 25-26. The court of appeals therefore held that "the district court's decision to rescind the contracts was not an abuse of discretion." Pet. App. 26. Petitioners offer no reason for this Court to revisit a fact-specific, abuse-of-discretion inquiry.

[14] There appears to be no present dispute that Respondents have both a procedural right under the ESA, *see, e.g., Bennett v. Spear*, 117 S. Ct. 1154, 1162-63 (1997); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180-81 (1978), and a concrete and cognizable interest in the terms of the Friant contracts, *see, e.g., Spear*, 117 S. Ct. at 1162-63 (holding that the ESA citizen suit provision expanded standing "to the full extent permitted under Article III"); *Natural Resources Defense Council v. Patterson*, 791 F. Supp. 1425 (E.D. Cal. 1992) (noting Respondents' allegations that their members "earn their living from the San Joaquin River and its environs and engage in recreational activites on the river" and have suffered "economic and recreational damage * * * occasioned by the drying up of the San Joaquin River below the Friant Dam resulting from the Bureau's delivery of water pursuant to the original contracts"). Moreover, Respondents' interest in the outcome of the case need not fit within any particular statutory "zone of interest." *See Spear*, 117 S. Ct. at 1162-63.

Id. The courts below correctly determined (Pet. App. 24-25, 123) that invalidation of the renewal contracts would benefit Respondents sufficiently to satisfy Article III.[15]

CONCLUSION

For the reasons stated above, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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[15] Petitioners in the separate Petition No. 98-1018 also raise *sui generis* contract issues and a question concerning the date on which a particular contract became effective. No. 98-1018 Pet. 2. Those questions turn on facts concededly "unique" (No. 98-1018 Pet. 13) to those Petitioners and with no general significance; they were properly addressed by the court of appeals (Pet. App. 26-30), and do not merit the attention of this Court. Moreover, as the court of appeals noted (Pet. App. 29), a prior case already decided that Madera and Chowchilla are not exempt from the ESA. *Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1405-06 (9th Cir.), *cert. denied*, 510 U.S. 813 (1993).

(5)

Supreme Court, U.S.
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No. 98-1018

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1998

CHOWCHILLA WATER DISTRICT AND MADERA IRRIGATION DISTRICT

Petitioners

vs,

NATURAL RESOURCES DEFENSE COUNCIL, ET AL.

Respondents

On Petition for Writ of Certiorari To the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF TO THE RESPONDENTS' BRIEF IN OPPOSITION

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I.
INTRODUCTION

A. THE COURT'S RULES.

Rule 15 2. provides in part:

> "In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatements of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatements made in the petition."

B. RESPONDENTS' BRIEF IN OPPOSITION FAILED TO RESPOND TO PETITIONERS' PETITION.

With the exception of footnote 15, no mention of Petitioners' Petition was made in Respondents' Brief in Opposition. In this footnote, no mention was made of Petitioners' assertion that prior congressional intent had declared that the Project was to operate with a dry river between Gravelly Ford and Mendota Pool and that this prior intent was carried forward in the CVPIA.

Nor did the Brief in Opposition mention the assertion in Petitioners' Petition that Chowchilla and Madera had vested rights of renewal by reason of their

1939 Contract which precluded Section 7 consultation prior to renewal.

If these were misstatements of fact or law, Respondents had the duty to address them. This they failed to do.

II.
THE IMPORTANCE OF A DECISION BY THIS COURT ON THE PREEMPTION ISSUE

This Court on four occasions has made decisions affecting the Friant Division of the Central Valley Project. These are: *United States v, Gerlach Live Stock Company* 339 U.S. 725, 94 L Ed 1231 (1950); *Ivanhoe Irrigation District v. McCracken,* 357 US 275, 78 S Ct 1174, 2 L Ed 2d 1313 (1950); *Dugan v. Rank,* 372 US 609, 83 S Ct 999, 10 L Ed 2d 15, (1963) and *City of Fresno v. State of California, United States of America et al.* 272 US 627, 10 L. ed 2d 28, 83 S Ct. 996 (1963).

The questions presented in this case are of equal, if not greater, importance than those previously decided by this Court.

If, contrary to the dictates of Congress, under § 5937 the Secretary is required to re-establish a salmon run that has not existed for well over fifty years, a million acres of the most productive farm lands in the United States will be deprived of a water supply sufficient to grow crops. Trees and vines in ar-

eas where there is no groundwater supply will die. Crops on lands, which do have a groundwater supply, will linger longer until that supply is exhausted. As stated in *California v. United States* 438 US 645, 57 L Ed 2d 1018, 96 S Ct. 2985 at 57 L Ed 2d:

"The prime value in our national economy of the lands of summer drought on the Pacific Coast is as a source of plant products that require mild winters and long growing seasons. Citrus fruits, the less hardy deciduous fruits, fresh vegetables in winter-these are their most important contributions at present. Rainless summers make possible the inexpensive drying of fruits, which puts into the market prunes, raisins, dried peaches, and apricots. In its present relation to American economy in general, the primary technical problem of agriculture in the Pacific Coast States is to make increasingly more effective use of the mild winters and the long growing season in the face of the **great obstacle presented by the rainless summers. To overcome that obstacle supplementary irrigation is necessary. Hence the key position of water in Pacific Coast agriculture."** (Emphasis added)

This issue alone is sufficient for the Court to grant certiorari. When the other issues are added, it becomes even more compelling.

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III.
CONGRESSIONAL INTENT

A. WHAT DID CONGRESS MEAN?

When Congress adopted § 3406(c) of the CVPIA and forbade the Secretary from releasing water from Friant to re-establish fish life until a plan which was "reasonable, prudent and feasible" was adopted and Congress gave authority to the Secretary to release flows, did it intend that contrary to this edict the same result could be accomplished by State action under § 5937?

Congressional intent is to be ascertained with respect to conditions that existed at the time of enactment of the statute. As stated in *United States v. Union Pacific Ry. Co.* 91 U S 72, 23 L Ed 221:

> "... courts may, with propriety, in construing a statute, recur to the history of the times when it was passed, and this is frequently necessary in order to ascertain the reason as well as the meaning of particular provisions in it."

The history of the times surrounding the adoption of the CVPIA § 3406(c) was that for well over fifty years the River was dry between Gravelly Ford and Mendota Pool with the knowledge and consent of Congress. Congressional purpose was made manifestly clear when they gave instructions to the Secretary.

B. FEDERAL SUPREMACY.

In *Ivanhoe Irrigation District v.McCracken,* 357 US 275, 78 S Ct 1174, 2 L Ed 2d 1313 at 1325,quoting from *Nebraska v. Wyoming* 325 U S 589, 89 L Ed 1815, the Court stated in referring to § 5 of the 1902 Act (acreage limitation):

'"We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system. Section 5 is a specific and mandatory prerequisite laid down by the Congress as binding in the operation of reclamation projects, providing that [no] right to the use of water shall be sold for a tract exceeding one hundred and sixty acres to any one landowner . . . We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State. To read § 8 to the contrary would require the Secretary to violate § 5, the provisions of which, as we shall see, have been national policy for over half a century. Without passing generally on the coverage of § 8 in the delicate area of federal-state relations in the irrigation field, we do not believe that the Congress intended § 8 to override the repeatedly reaffirmed national policy of § 5'"

If, in the foregoing quotation we were to substitute § 3406(c) of the CVPIA which requires first a plan that is "reasonable, prudent and feasible" and then further action by Congress before any water is released from the dam for restoration of fish by the Secretary,

for § 5 of the 1902 Act, the Court would again adopt the proper approach. "To read § 8 to the contrary would require the Secretary to violate" §3406(c).

IV.
CONCLUSION

The whole purpose of the Central Valley Project was to provide irrigation water for the East side of the San Joaquin Valley, by delivery of the full flows of the San Joaquin River diverted at Friant Dam, delivered through the Madera and Friant Kern Canals.

The cost of doing this was to create a dry river between Gravelly Ford and Mendota Pool.

Respondents seek to undo this Congressional Project by application of a State law that would require releases from Friant Dam to re-establish a Salmon run which has been non-existent for over fifty years.

To do this, they must apply State law under Section 8 to override a specific congressional directive to the Secretary of Interior.

Certiorari should be granted.

Dated: April 27, 1999

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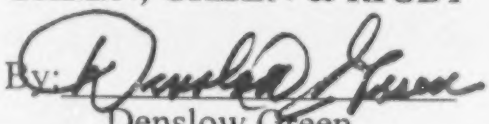
By: 

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